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COMMENTARIES
ON
THE LAWS OF ENGLAND.

BY

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ADDENDA ET CORRIGENDA.

Page 13 n. (*l*). The law will, after the close of this year (1869), be regulated by 32 & 33 Vict. c. 71, s. 36.

14 n. (*o*). Add reference to *Anderson's Case*, "L. R. 3 Eq. 337."

15 n. (*r*). After "*Alvanley v. Lewis*," insert "1."

151. The statute 9 & 10 Vict. c. 95, is amended as regards some not very important particulars, by the 27 & 28 Vict. c. 95.

312 n. (*i*), line 2. For "on," read "or."

COMMENTARIES

ON THE

LAWS OF ENGLAND.

BOOK THE THIRD.

PRIVATE WRONGS.

CHAPTER I.

REDRESS OF PRIVATE WRONGS BY THE ACT OF THE PARTIES.

AT the opening of these Commentaries (*a*) municipal law was in general defined to be, “a rule of civil conduct, prescribed by the supreme power in a state, commanding what is right, prohibiting what is wrong (*b*), and regulating matters in themselves indifferent.” Hence therefore it followed, that the primary objects of our law are the establishment of rights, and the prohibition of wrongs. And this occasioned the distribution of these collections into two general heads (*c*); under the former of which we have considered the rights that were defined and esta-

(*a*) Vol. I. pp. 37, 38.

Philipp. 12; Bract. l. 1, c. 3.

(*b*) *Sanctio justa, jubens honesta,*

(*c*) Vol. i. chap. 1.

et prohibens contraria; Cic. 11,

blished, and under the latter we are now to consider the wrongs, including torts and breaches of contract, that are forbidden, and redressed by the laws of England.

Wrongs are private or public.

Wrongs are divisible into two sorts or species; private wrongs, and public wrongs. A private wrong is an infringement or privation of some private or civil right belonging to an individual, and may be termed a civil injury: a public wrong is a breach and violation of some public right and duty, which affects the whole community; and is distinguished by the harsher appellation of a crime. To investigate the first of these species of wrongs, with the remedies appropriate thereto, will be our employment in the present Book; and the other species will be reserved till the next or concluding Volume.

The redress for a private wrong is by parties themselves, by operation of law, or by suit or action.

The more effectually to accomplish the redress of private injuries, courts of justice are instituted in every civilized society, in order to protect the weak from the insults of the stronger, by expounding and enforcing those laws, by which rights are defined, and wrongs prohibited. This remedy is therefore principally to be sought by application to these courts of justice; that is, by civil suit or action. For which reason our chief employment in this Volume will be to consider the redress of private wrongs, by suit or action in court. But as there are certain injuries of such a nature, that some of them furnish and others require a more speedy remedy, than can be had by the ordinary forms of justice, there is allowed in any such case an extrajudicial or eccentric kind of remedy; of which I shall first treat, before considering the several remedies by suit and action: and, to that end, shall distribute the redress of private wrongs into three several species: first, that which is obtained by the mere act of the parties themselves; secondly, that which is effected by the mere act and operation of law; and, thirdly, that which arises from suit, action, or other proceeding in court, and consists in a conjunction of the other two, the act of the parties co-operating with the act of law.

And, first of that redress of private injuries, which is obtained by the mere act of the parties. This is of two sorts; I. That which arises from the act of the injured party only; and, II. That which arises from the joint act of all the parties together.

Redress by
act of the
parties.

I. Of the former sort, or that which arises from the sole act of the injured party, is,

I. By sole
act of party
injured.

1. The defence of one's self, or the mutual and reciprocal defence of each other by husband and wife, parent and child, master and servant (*d*). For if the party himself, or any one thus related to him, be forcibly attacked in person or property, it is lawful for him to repel force by force; and the breach of the peace, which happens, is chargeable upon him only who began the affray (*e*).

1. Self de-
fence.

The law, in this case, respects the passions of the human mind; and (when external violence is offered to a man himself, or one to whom he bears so near a connexion) makes it lawful in him to do himself that immediate justice, to which he is prompted by nature, and which no prudential motives are strong enough to restrain. The future process of law may be by no means an adequate remedy for an injury accompanied with force; and it is impossible to say, to what wanton lengths of rapine or cruelty an outrage of this sort might be carried, unless it were permitted a man immediately to oppose one violence with another. Self-defence, therefore, as it is justly called the primary law of nature, so is not, neither can it be in fact, taken away by the law of society. In the English law particularly it is sometimes held to furnish an excuse for a breach of the peace, nay even for homicide itself (*f*); but care must be taken, that the resistance does not ex-

(*d*) It is said (*Levard v. Basely*, 1 Ld. Raym. 62, and Bul. N. P. 18) that a master cannot justify an assault in defence of his servant, because he might have an action *per quod servitium amisit*. But according to 2 Rol. Abr. 546, D. pl.

2; *Seuman v. Cuppledick*, Owen, 151; Bac. Abr. Master and Servant, P., such an interference by the master is lawful.

(*e*) 2 Rol. Abr. 546; 1 Hawk. P. C. 483, s. 23.

(*f*) *Post*, vol. iv.

2. Recap-
tion.

ceed the bounds of mere defence and prevention ; for then the defender would himself become an aggressor.

2. Recaption or reprisal is another species of remedy by the mere act of the party injured. This happens, when any one has deprived another of his property in goods or chattels personal, or wrongfully detains one's wife, child, or servant : in which case the owner of the goods, the husband, parent, or master, may lawfully claim and retake such property or person, wherever found ; so it be not in a riotous manner, or attended with a breach of the peace (*g*). The reason for which is obvious ; since the owner may have this only opportunity of doing himself justice : his goods might be afterwards conveyed away or destroyed ; and his wife, child, or servant, concealed or carried out of his reach ; if he had no speedier remedy than the ordinary process of law. If therefore where personal property has been forcibly taken its rightful owner can so contrive as to regain possession of it, without violence or terror, the law favours and will justify his proceeding (*h*). But as the public peace must be considered rather than any one man's right of property ; and as, if individuals were once allowed to use private force as a remedy for private injuries, all social justice must cease, the strong would give law to the weak, and every man would revert to a state of nature ; for these reasons it is provided, that this natural right of recaption shall never be exerted, where such exertion must occasion strife and bodily contention, or endanger the peace of society. If, for instance, my horse is taken away, and I find him on a common, at a fair, or at a public inn, I may lawfully seize

(*g*) 3 Inst. 134 ; Hale, Anal. s. 46. Where goods have been obtained with a preconceived design of not paying for them, the seller may lawfully retake them from the party who obtained them, for the fraud vitiates the sale, and prevents the

property from passing by it, *Earl of Bristol v. Wilsmore*, 1 B. & Cr. 514.

(*h*) *Burridge v. Nicholls*, 6 H. & N. 383 ; *Smith v. Wright*, *Id.* 821.

him to my own use; but I cannot justify breaking open a private stable, or entering on the grounds of a third person, to take him, except he be feloniously stolen (*i*); but must have recourse to an action at law.

3. As recaption is a remedy given to the party himself, ^{3. Re-entry on land.} for an injury to his personal property, so, a remedy of the same kind for an injury to real property is sometimes permitted by entry on lands and tenements, when another person without any right has taken or retains possession thereof. This depends in some measure on like reasons with the former; and like that too must be peaceable and without force or violence which might endanger the public peace. There is some nicety required in defining and distinguishing circumstances in which such entry might be lawful or otherwise; and especially in determining whether notice should be given before re-entry and eviction to the person who is wrongfully in possession (*k*).

4. A fourth species of remedy by the mere act of the party injured, is the abatement, or removal of a nuisance. ^{4. Abatement of nuisance.} What a nuisance is, we shall find a more proper place hereafter to inquire. At present we may observe generally, that whatsoever unlawfully annoys or does damage to another, is a nuisance; and such nuisance may sometimes be abated, that is, taken away or removed, by the party aggrieved thereby, so as he commits no riot in the doing of it (*l*). If a wall is erected so near to my house that it stops my ancient lights, which is a private nuisance, I may enter my neighbour's land, and peaceably pull it down. Likewise if a bar or gate be wrongfully erected across the public highway, which is a common nuisance, any of the queen's subjects passing that way may, if necessary for the exercise of that right, cut it down and destroy

(*i*) 2 Roll. Rep. 55, 56, 208; 2 Roll. Abr. 565, 566.

Exch. 261; 14 M. & W. 442.

(*k*) *Newton v. Harland*, 1 M. & Gr. 644; *Harvey v. Bridges*, 1

(*l*) *Penruddock's Case*, 5 Rep. 100; *Baten's Case*, 9 Rep. 55.

it (*m*). And the reason why the law allows this private and summary method of doing one's self justice, is because injuries of this kind, which obstruct or annoy such things as are of daily convenience and use, require an immediate remedy; and cannot wait for the slow progress of the ordinary forms of justice.

Before proceeding to abate a nuisance, a notice to remove it is sometimes requisite (*n*).

5. DISTRESS.

5. A fifth case, in which the law allows a man to be his own avenger, or to minister redress to himself, is that of distress, whether for rent in arrear or damage feasant, which has been noticed in our preceding volume.

6. SEIZURE OF HERIOT.

6. The seizing of a heriot when due on the death of a tenant is another species of self-remedy, likewise already noticed (*o*).

II. REMEDY BY JOINT ACT OF ALL THE PARTIES.

II. Such being the several remedies which may be had by the mere act of the party injured, those will next be mentioned which arise from the joint act of all the parties.

1. ACCORD AND SATISFACTION.

1. Accord and satisfaction as between the party injuring and the party injured, will bar an action for such injury. If a man contract to build a house or deliver a horse, and fail in it; for this breach of contract the sufferer may have his remedy by action; but if he accept a sum of money, or other thing, as a satisfaction, this may operate as a redress of his grievance, and entirely take away his right

(*m*) *Dimes v. Petley*, 15 Q. B. 276; *Bateman v. Bluck*, 18 *id.* 870. In *Hyde v. Graham*, 1 H. & C. 598, Pollock, C. B., referring to the instances above given, "where a person is allowed to obtain redress by his own act, as well as by operation of law," (*post*, p. 11.) observes that such "occasions are very few," and "might constantly lead to breaches of the peace; for if a man has a right to remove a gate placed across the land of another,

he would have a right to do it even though the owner was there and forbid him. The law of England appears to me, both in spirit and on principle, to prevent persons from redressing their grievances by their own act."

(*n*) *Jones v. Williams*, 11 M. & W. 176; *Perry v. Fitzhove*, 8 Q. B. 757; *Davies v. Williams*, 16 *id.* 546; *Dimes v. Petley*, 15 *id.* 276.

(*o*) *Ante*, vol. ii.

of action (*p*). But payment of a less sum cannot be *per se* an accord and satisfaction of a greater ascertained sum (*q*).

2. Arbitration is where the parties, injuring and injured, submit matters in dispute, concerning any personal chattel or personal wrong, to the judgment of two or more arbitrators, who are to decide the controversy; and if they do not agree, it is usual to add, that another person be called in as umpire (*imperator* or *impar* (*r*)), to whose sole judgment it is then referred (*s*): or one arbitrator may be originally appointed. The decision, in any such case, is called an award. And, if the award stands, the question is thereby as fully determined, and the right, which was in contest, transferred or settled, as it could have been by the agreement of the parties or the judgment of a court of justice. The right to real property, however, could not formerly have thus passed by a mere award (*t*): which subtilty had its rise from feudal principles; for if this had been permitted, the land might have been aliened collusively without the consent of the superior. But an arbitrator may now award a conveyance or a release of land; and it will be a breach of the arbitration-bond to refuse compliance (*u*). For though originally the submission to arbitration used to be by word or in writing, yet both of these being revocable in their nature, it became a common practice for the parties to enter into mutual bonds, with conditions to stand to the award of the arbitrators therein named. And experience having shown the great use of these peaceable and domestic tribunals, especially in matters of account, and other mercantile transactions, which may be difficult of adjustment on a trial at law, the legis-

(*p*) *Blake's Case*, 6 Rep. 43; *Peyton's Case*, 9 Rep. 79.

(*q*) *Sibree v. Tripp*, 15 M. & W. 23.

(*r*) Whart. Angl. Sacr. i. 772; Nicols. Scot. Hist. Libr. ch. 1,

prope finem.

(*s*) See 17 & 18 Vict. c. 125, s. 14.

(*t*) 1 Roll. Abr. 242; *Marks v. Marriot*, 1 Ld. Raym. 114, 115.

(*u*) And see the 17 & 18 Vict. c. 125, s. 16.

lature has by several statutes sanctioned the use of arbitrations as well in controversies depending in court, as in those where no action has been brought. By 9 & 10 Will. 3, c. 15, it was enacted, that all merchants and others, desirous of ending any controversy, suit, or quarrel (for which there is no other remedy but by personal action or suit in equity), may agree, that their submission of the suit to arbitration or umpirage shall be made a rule of court, and may insert such agreement in their submission, or in the condition of the arbitration-bond(*x*): which agreement being proved upon oath by one of the witnesses thereto, the court shall make a rule that such submission and award shall be conclusive; and, after such rule made, the parties disobeying the award shall be liable to be punished, as for a contempt of the court; unless such award be set aside for corruption or other misbehaviour in the arbitrators or umpire(*y*), proved on oath to the court, within one term after the award is made. Under this statute, the superior courts interfered to set aside awards when partially or illegally made; or to enforce their execution, when legal, by process of contempt.

By the above statute, however, of 9 & 10 Will. 3, a parol submission could not be made a rule of court, and the remedy by arbitration still remained defective; for a party might at any time before the award was made, or after it was made, but before the agreement was made a rule of court, revoke his submission, a power which was frequently exercised where one of the parties had by some means ascertained that the arbitrator was unfavourably disposed towards him. Besides this, an arbitrator had no power to compel the attendance of a witness, or to administer an oath to him; and therefore if a witness on either side was

(*x*) And now by the 17 & 18 Vict. c. 125, s. 17, every agreement or submission to arbitration in writing may be made a rule of court, unless a contrary intention

appear therein.

(*y*) As to the grounds of setting aside an award, see Russell on Arbitr. 3rd ed. Chaps. ix—xi. *Re Hopper*, 36 L. J., Q. B. 97.

unwilling to give evidence, it was not safe to consent to an arbitration, and the evidence being given without the sanction of an oath, the proceeding by arbitration was less satisfactory than that before a jury. It was accordingly deemed expedient yet further to extend and improve the remedy by arbitration, and several provisions contained in the statute 3 & 4 Will. 4, c. 42, were directed to this object. By sect. 39, it was provided that if the submission contained an agreement that it should be made a rule of court, it should not be revocable without leave of the court or a judge. By sect. 40, the court or a judge was empowered to command the attendance and examination of any person, or the production of any document; and sect. 41 enabled the arbitrators or umpire to administer an oath, and has subjected a witness wilfully giving false evidence, in the matter of an arbitration, to the penalties of perjury.

Other material improvements have been made in the law of arbitrations, by the statute 17 & 18 Vict. c. 125, as well by amending the pre-existing law upon this subject (*z*), as by enabling the court or a judge to compel a reference to arbitration either before or at the time of trial, where the matter in dispute consists, wholly or in part, of items of mere account, which cannot conveniently be tried (*a*). Under the provisions first alluded to, an action commenced by one of the parties to the reference after all have agreed thereto may be stayed (*b*), where the parties cannot concur in the appointment of an arbitrator, he may be appointed upon summons by a judge (*c*); where the reference is to two arbitrators, and one party fails to appoint, the other party may appoint an arbitrator to act alone (*d*), and the award, unless when otherwise agreed or ordered, is to be made within three months, if the term for making

(*z*) Ss. 11—17.

(*a*) Ss. 3 (amended by 21 & 22 Vict. c. 74, s. 5), 6.

(*b*) S. 11.

(*c*) S. 12.

(*d*) S. 13.

it be not enlarged (*e*). The latter series of provisions (*f*) regulate the procedure, where the reference is compulsory, and *inter alia* empower the arbitrator to state his award, as to the whole or any part thereof, in the form of a special case for the opinion of the court (*g*).

(*e*) S. 15.

(*f*) Ss. 3—10.

(*g*) S. 5.

CHAPTER II.

REDRESS OF PRIVATE WRONGS BY THE OPERATION OF LAW.

THE remedies for private wrongs, which are effected by the mere operation of law, will fall within a very narrow compass: the principal are these, known as, I. Retainer, (where a creditor is made executor or administrator to his debtor). II. Set-off. III. Remitter, to which may be added, IV., the effect of the marriage of parties in certain cases.

I. If a person indebted to another makes his creditor or debtee his executor (*a*), or if such creditor obtains letters of administration (*b*) to his debtor; in these cases the law gives him a remedy for his debt, by allowing him to retain so much as will pay himself, before any other creditors whose debts are of equal degree. This is a remedy by the mere act of law, and grounded upon this reason; that the executor cannot, without an apparent absurdity, commence a suit against himself as representative of the deceased, to recover that which is due to him in his own private capacity: but, having the whole personal estate in his hands, so much as is sufficient to answer his own demand is, by operation of law, applied to that particular purpose. Else, by being made executor, he would be put in a worse condition than all the rest of the world besides. For, though a rateable payment of all the debts of the deceased, in equal degree, is clearly the most equitable method, yet as

(a) 1 Roll. Abr. 922; *Woodward* 127; *Bond v. Green*, 1 Brownl. 75.
v. Darcy, Plowd. 184. See Williams on Executors, 6th ed.

(b) *Warner v. Wainford*. Hob. pp. 971 *et seq.*

every scheme for a proportionable distribution by an executor or administrator, of the assets among all the creditors has been hitherto found to be impracticable, and productive of more mischiefs than it would remedy; so that the creditor who first commences his suit is entitled to a preference in payment; it follows, that as the executor can commence no suit, he must be paid the last of any, and of course must lose his debt, in case the estate of his testator should prove insolvent, unless he be allowed to retain it. The doctrine of retainer is therefore the necessary consequence of that other doctrine of the law, the priority of such creditor who first commences his action. But the executor shall not retain his own debt, in prejudice to those of a higher degree; for the law only puts him in the same situation, as if he had sued himself as executor, and recovered his debt; which he never could be supposed to have done, while debts of a higher nature subsisted. Neither shall one executor be allowed to retain his own debt, in prejudice to that of his co-executor in equal degree; but both shall be discharged in proportion (*c*). Nor shall an executor of his own wrong be permitted to retain (*d*), except in the case where he becomes so (*e*) through accepting a gift of the intestate's effects from an administrator who has obtained the grant fraudulently. Whether an executor might retain for a debt barred by the statute was formerly in some doubt; recent decisions, which may be accepted as settling the question, have established the right in this case also (*f*).

(*c*) *Chapman v. Turner*, 11 Vin. Abr. 72, tit. Exors. D. 2; *S. C.* 9 Mod. 268.

(*d*) *Coulter's case*, 5 Rep. 30; *S. C.* Cro. Eliz. 630.

(*e*) By 43 Eliz. c. 8, the statute expressly reserves the right of retainer.

(*f*) *Stahlschmidt v. Lett*, 1 Sm. & G. 415; *Hill v. Walker*, 4 K. &

J. 166; *Sharman v. Rudd*, 27 L. J., Ch. 844. In the analogous case of remitter, however, the rule seems to be that there is no remitter to an estate a right to which would be barred by the statute, see *post*, p. 14 n. (*p*), and p. 16. Upon the general law of Retainer, see Williams on Executors, *ubi sup.*, and *Stammers v. Elliot*, L. R. 3 Ch. 195.

II. Set-off is a right somewhat analogous to retainer; II. Set-off. it exists where there are cross demands between two persons. If a man has a claim for a sum of money against another and is also indebted to him, he may consider his claim to be a discharge or extinguishment of his debt, if they be equal in amount, or *pro tanto* if unequal. This rule, founded upon reason and justice, inasmuch as it prevents unnecessary multiplication of suits and much inconvenience of other kinds, seems to have been adopted originally from the Roman Law (*g*). "*Ideo necessaria est compensatio, quia interest nostra potius non solvere quam solutum repetere*" is the statement in the Digest (*h*) of its foundation.

The doctrine was not, however, voluntarily accepted by our courts of common law, and in early times its benefit could only be obtained in courts of equity where it seems to have been always recognised (*i*). The obviously disastrous consequences of not admitting it in the event of the bankruptcy of one of the parties led to its recognition by the legislature in that case (*k*). And not long afterwards the same supreme authority interfered to permit a set-off to be pleaded at law in general cases (*l*).

(*g*) This was the opinion of Sir Thomas Clarke. See *Whitaker v. Rush*, Amb. 407.

(*h*) Lib. xvi. tit. 2. De Compensationibus. In a comment on "*necessaria*," it is said, "*Id est cum lis possit uno judicio definiri, scilicet per actionem et exceptionem, pluralitas seu multitudo judiciorum non debet admitti, ut quæ incommoda sumptusque adferat; quin etiam compensationem æquitas postulare videtur, nam dolo facit qui petit quod restitutus est.*" Corp. Jur. Civ. Dion. Gothofredi, 1615.

(*i*) *Downam v. Matthew*, Prec. Chan. 580; 1 Ch. 499; *Anon.*, 1 Mod. 215; *Curzon v. African Co.*,

1 Vern. 121; *Chapman v. Derby*, 2 Vern. 117; *Peters v. Soame*, 2 Vern. 428; *Jeffs v. Wood*, 2 P. W. 128; *Green v. Farmer*, 4 Burr. 2220.

(*k*) The first statute is 4 & 5 Anne, c. 17. Subsequent Acts allowing set-off in bankruptcy are, 5 Geo. 1, c. 11; 5 Geo. 2, c. 30, s. 28; 46 Geo. 3, c. 125, s. 3; 12 & 13 Vict. c. 106, s. 172, which last regulates the law as now in force.

(*l*) 2 Geo. 2, c. 22, s. 12, made perpetual by 8 Geo. 2, c. 24, s. 4, and see s. 5. See also *Isberg v. Bowder*, 8 Exch. 852. A form of plea is given in Sch. B. No. 41, of the Common Law Procedure Act,

There are various rules and conditions which regulate the application of the doctrine, into which we cannot appropriately enter here at any length. They depend upon the nature of the relation existing between the parties and the character of the conflicting claims. Thus where the claims are in different rights (*m*), or where one is for unliquidated damages or for tort, the other being a common debt of fixed amount (*n*), or where the debt in respect of which set-off is claimed accrued after the commencement of the action (*o*), no set-off will be allowed, and it would seem that set-off may not be asserted in respect of a debt barred by the Statutes of Limitations (*p*).

Courts of equity, having a wider cognisance of rights and claims than courts of law, are still (*q*) sometimes

1852, and see, besides, 23 & 24 Vict. c. 126, s. 21.

(*m*) *West v. Pryce*, 2 Bing. 555; *Wool v. Smith*, 4 M. & W. 525; *Groom v. Mealey*, 2 Bing. N. C. 138; *Bishop v. Church*, 3 Atk. 691; *Whitaker v. Rush*, Amb. 407; *Chapman v. Derby*, 2 Vern. 117; *Mardall v. Thellusson*, 6 E. & B. 976; *Rees v. Watts*, 11 Exch. 410. Unless the circumstances are very special, *Freeman v. Lomas*, 9 Hare, 169; *Bousfield v. Lawford*, 1 De G. J. & S. 459. See also *Stammers v. Elliott*, L. R. 4 Eq. 675; and on appeal, 3 Ch. 195.

(*n*) *Bell v. Corey*, 8 C. B. 887; *Crompton v. Walker*, 3 E. & E. 321; *Thompson v. Redman*, 11 M. & W. 487.

(*o*) *Richards v. James*, 2 Ex. 471; and see for further illustrations the cases *Pratt v. Keith*, 33 L. J. Ch. 528; *In re Bank of Hindostan, Smith's Case*, L. R. 3 Ch. 125.

(*p*) *Chapple v. Durston*, 1 Cr. & J. 1; *Fairthorne v. Donald*, 13 M. & W. 424. This appears however

a somewhat harsh rule: in analogous cases, such as lien, the statutes are disregarded, *Spears v. Hartley*, 3 Esp. 81; *Higgins v. Scott*, 2 B. & Ad. 413; and see *Mills v. Fowkes*, 5 Bing. N. C. 455. Again, V.-C. Kindersley held, in *Edwards v. Waugh* (L. R. 1 Eq. 418, overruling the M. R. in *Mason v. Broadbent*, 33 Beav. 296), that a mortgagee may retain out of moneys produced by sale of the mortgaged properties more than six years' interest, notwithstanding 3 & 4 Will. 4, c. 27, s. 42. And in the case of a legacy to a debtor whose debt is barred, it is now quite established that the executor may set off the legacy against the debt, *Courtenay v. Williams*, 3 Hare, 539; *Coates v. Coates*, 33 Beav. 249. It is to be observed that the statutes, 21 Jac. 1, c. 16, and 3 & 4 Will. 4, c. 42, only take away the remedy and not the right; the other Act, 3 & 4 Will. 4, c. 27, takes away the right also.

(*q*) *Jones v. Moore*, 4 Y. & C. 351; *Baillie v. Edwards*, 2 H. L.

resorted to for the protection afforded by the right of set-off: they, however, to a great extent observe conditions similar to those established as rules at law (*r*).

III. Remitter is where he who has the true property or *jus proprietatis* in lands, but is out of possession thereof, and hath no right to enter without recovering possession in an action, hath afterwards the freehold cast upon him by some subsequent, and of course defective, title; in this case he is remitted, or sent back by operation of law, to his ancient and more certain title (*s*). The right of entry, which he has gained by a bad title, shall be *ipso facto* annexed to his own inherent good one: and his defeasible estate shall be utterly defeated and annulled, by the instantaneous act of law, without his participation (*t*). As if A. disseises B., that is, turns him out of possession, and dies, leaving a son, C.; hereby the estate descends to C., the son of A., and B. is barred from entering thereon till he proves his right in an action (*t*): now, if afterwards C., the heir of the disseisor, makes a lease for life to D., with remainder to B. the disseisee for life, and D. dies: hereby the remainder accrues to B., the disseisee: who thus gaining a new freehold by virtue of the remainder, which is a bad title, is by act of law remitted, or in of his former and surer estate (*u*). For he hath hereby gained a new right of possession, to which the law immediately annexes his ancient right of property. And it may be remarked that

III Remitter.

Ca. 74; *Macmahon v. Burchell*, 3 Hare, 97; *Jones v. Mossop*, 3 Hare, 568.

(*r*) See the principles regulating set-off in equity stated in *Clarke v. Cort*, Cr. & Ph. 154; *Ranson v. Samuel*, *ib.* 161; *Freeman v. Lomas*, 9 Hare, 109, and illustrated in *Cavendish v. Graves*, 24 Beav. 163; *Courtenay v. Williams*, 3 Hare, 539; *Jones v. Mossop*, 3 Hare, 568;

Alvanley v. Lewis, L. J. (N. S.) Ch. 55; *In re Commercial Bank*, L. R. 2 Ch. 538; *In re Overend Gurney and Co. (Grissell's Case)*, *ib.* 528.

(*s*) Litt. s. 659. This and the following thirty-seven sections of Littleton's treatise contain a large variety of cases of remitter.

(*t*) Co. Litt. 348; Cro. Jac. 489.

(*u*) Finch. L. 194; Litt. s. 683.

this takes place whatever may be his will or intention. He is remitted *volens volens* (x).

If the subsequent estate, or right of possession, be gained by a man's own act or consent, as by immediate purchase being of full age, he shall not be remitted. For the taking such subsequent estate was his own folly, and shall be looked upon as a waiver of his prior right (y). Therefore it is to be observed, that to every remitter there are regularly these incidents; an ancient right, and a new defeasible estate of freehold in possession, uniting in one and the same person; which defeasible estate must be cast upon the rightful owner not gained by his own act: except, indeed, in the case of an infant or married woman, against whom the law will not adjudge folly (z).

The reason given by Littleton (a), why this remedy, which operates silently, and involuntarily, by the mere act of law, was allowed, is somewhat similar to that given for retainer; because otherwise he who hath right would be deprived of all remedy. For as he himself is the person in possession of the freehold, there is no other person against whom he can bring an action, to establish his prior right. And for this cause the law doth adjudge him in by remitter; that is, in such plight as if he had lawfully recovered the same land by suit. For, as Lord Bacon observes (b), the benignity of the law is such, as when, to preserve the principles and grounds of law, it depriveth a man of his remedy without his own fault, it will rather put him in a better degree and condition than in a worse. *Nam quod remedio destituitur, ipsâ re valet, si culpa absit.* But there shall be no remitter to a right which is extinguished, or for which the party has no remedy by action (c): as if it be barred by the Statute of Limitations (d): or if

(x) Litt. s. 690; Com. Dig. Remitter, B. 3; *Doc d. Daniell v. Woodroffe*, 2 H. L. 811.

(y) Co. Litt. 348, 350.

(z) Co. Litt. 349, 351, 352.

(a) S. 661.

(b) Elem. r. 9.

(c) Co. Litt. 349.

(d) See *Doc d. Daniell v. Woodroffe* 10 M. & W. 608; 15 M. & W.

under the law as it stood prior to the act abolishing fines, the issue in tail had been barred by the fine of his ancestor and the freehold was afterwards cast upon him; he was not remitted to his estate tail (*e*): for the operation of the remitter is exactly the same, after the union of the two rights, as that of a real action would have been before it. As therefore the issue in tail could not by any action have recovered his ancient estate, he could not recover it by remitter. Of course under the present law there can be no remitter to an estate tail barred by a disentailing assurance duly executed by the ancestor. Inasmuch as the possession of one coparcener, joint tenant, or tenant in common is not the possession of any other (*f*), therefore if one be remitted to any of these estates no advantage accrues to any other (*g*).

IV. Besides the remedies of retainer, remitter, and set-off, we may here mention another mode whereby a right may be extinguished by operation of law, and so in a manner a wrong may be considered as redressed. If a woman marry her creditor or debtor, in either case the debt is absolutely extinguished (*h*). The debt, however, must be one which, if existing, would be payable during the coverture, otherwise it is not extinguished; for instance, if a bond be given to a woman in contemplation of her marriage with the obligor, conditioned to pay a sum of money to her or her representatives after the obligor's death, this bond would be valid, notwithstanding the marriage (*i*).

IV. Marriage of debtor and creditor.

768; 2 H. L. Ca. 811; in which case the law concerning remitter was much discussed.

(*e*) *Anon.* Moor. 115; *Minter v. Collins*, 1 Andr. 286; *Doe d. Daniell v. Woodroffe*, *ubi sup.*

(*f*) *Culley v. Taylerson*, 11 A. & E. 1008; *Burroughs v. M'Creight*, 1 J. & L. 290; 3 & 4 Will. 4. c.

27, s. 12.

(*g*) *Doe d. Daniell v. Woodroffe*, *ubi sup.*

(*h*) Co. Litt. 264, b.

(*i*) *Cage v. Acton*, 1 Raym. 515; S. C. 1 Salk. 325, and *sub. nom.*; *Acton v. Peirce*, 2 Vern. 480; *Melbourne v. Ewart*, 5 T. R. 381.

Conclusion. And thus much for these extrajudicial remedies, as well for real as personal injuries, which are furnished or permitted by the law, where the parties are so peculiarly circumstanced, as not to make it eligible, or in some cases even possible, to apply for redress in the usual and ordinary methods to the courts of public justice.

CHAPTER III.

COURTS IN GENERAL.

THE next, and principal, object of our inquiries is ^{Redress by} redress by suit in court: wherein the act of the parties ^{suit in} and the act of law co-operate; the act of the parties being ^{court.} necessary to set the law in motion, and the process of the law being in general the only instrument by which the parties are enabled to procure a certain and adequate redress.

And here it will not be improper to observe, that although in the several cases of redress by the act of the parties mentioned in a former chapter (*a*), the law allows an extrajudicial remedy, yet that remedy is not compulsory, and does not exclude the ordinary course of justice: it is only an additional weapon put into the hands of persons in particular instances, where natural equity or the peculiar circumstances of their situation require a more expeditious remedy, than the formal process of a court of judicature can furnish. Therefore, though I may defend myself from external violence, I yet am afterwards entitled to an action of assault and battery: though I may retake my goods, if I have a fair and peaceable opportunity, this power of recaption does not debar me from my action: I may either enter on the lands, on which I have a right of entry, or may demand possession by action: I may either abate a nuisance by my own authority, or call upon the law to do it for me: I may distrain for rent,

(a) Chap. I.

or have an action of debt, at my own option : if I do not distrain my neighbour's cattle damage-feasant, I may compel him by action to make me a fair satisfaction for the damage done ; if a heriot be withheld from me by fraud or force, I may recover it though I never seized it. And with regard to accords and arbitrations, either of these, being in its nature merely an agreement or compromise, indisputably supposes a previous right of obtaining redress some other way ; which is given up by such agreement. And as to remedies by operation of law, those are indeed given, because no remedy can be administered by suit or action, without running into the palpable absurdity of a man's bringing an action against himself : the two cases wherein they happen being such, that the only possible legal remedy would have to be directed against the very person who seeks relief.

Otherwise, however, it is a rule, that where there is a legal right, there is a legal remedy, by suit in court or by application to a court of justice, whenever that right is invaded. And in treating of such remedy, I shall now consider the nature of courts in general ; and shall afterwards inquire as to the several species of courts, the jurisdiction of each, and the method of obtaining the redress which it affords.

A court, how
defined.

A court is defined to be a place wherein justice is judicially administered (*b*). And, as by our constitution the sole executive power of the laws is vested in the person of the sovereign, courts of justice, which are the medium by which he administers the laws, are derived from the power of the crown (*c*). For, whether created by act of parliament, or letters patent, or subsisting by prescription (the only methods by which any court of judicature can exist (*d*)), the royal consent in the two former is expressly, and in the latter is impliedly, given.

(*b*) Co. Litt. 58.

(*c*) See Bk. I. chap. 7.

(*d*) Co. Litt. 260.

In these courts the sovereign is supposed in contemplation of law to be always present; or at least is there represented by the judges, whose power is but an emanation of the prerogative.

For the more speedy and impartial administration of justice between subject and subject, the law has appointed various courts, some with a more limited, others with a more extensive jurisdiction; some constituted to inquire only, others to hear and determine; some to determine in the first instance, others upon appeal. These will be taken notice of in their respective places: and here one distinction only that runs throughout them need be noticed; *viz.* between courts of record and courts not of record. A court of record is that, whose acts and judicial proceedings are enrolled for a perpetual memorial and testimony: which rolls are called the records of the court, and are of such high and super-eminent authority, that their truth is not to be called in question. For it is a settled rule and maxim that nothing shall be averred against a record, nor shall any plea, or even proof, unless where fraud is involved, be admitted to the contrary (*e*). And if the existence of a record be denied, it shall be tried by nothing but itself: that is, upon bare inspection whether there be any such record or no; else there would be no end of disputes. But, if there appear any mistake of the clerk in making up such record, the court will direct him to amend it. All courts of record are said to be the queen's courts, in right of her crown and royal dignity (*f*), and no other court has authority to fine or imprison for a contempt; so that the very erection of a new jurisdiction with such power makes it a court of record (*g*).

As exemplifying the nature of a court not of record

(*e*) Co. Litt. 260.

(*f*) Finch. L. 231.

(*g*) *Groenvell v. Burwell*, Salk. 200; *Grenville v. Coll. of Physi-*

cians, 12 Mod. 388. See *Inhabitants of Oldbury v. Stafford*, 1 Sid. 145.

may be instanced the court-baron incident to a manor, where the proceedings are not enrolled or recorded; but as well their existence as the truth of the matters therein contained may, if disputed, be tried and determined by a jury.

Its consti-
tuent parts.

In every court there must be three constituent parts, the *actor*, *reus*, and *judex*: the *actor*, or plaintiff, who complains of an injury done; the *reus*, or defendant, who is called upon to make satisfaction for it; and the *judex*, or judicial power, whose duty it is to examine the truth of the fact, to determine the law arising upon that fact, and, if any injury appears to have been done, to ascertain, and by its officers to apply the remedy. It is also usual in a court of justice to have attornies or solicitors, and advocates or counsel, as assistants.

Attornies.

An attorney at law, or a solicitor, answers to the *procurator*, or proctor, of the civilians and canonists (*h*), and is one put in the place, stead, or turn of another, to manage his matters of law. Formerly every suitor was obliged to appear in person, to prosecute or defend his suit, unless by special licence under the king's letters patent (*i*). And an idiot cannot at this day appear by attorney, but must do so in person (*k*), for he has not discretion to enable him to appoint a proper substitute. But, as in the Roman law, "*cum olim in usu fuisset, alterius nomine agi non posse, sed, quia hoc non minimam incommoditatem habebat, ceperunt homines per procuratores litigare*" (*l*), so with us, upon the same principle of convenience, it was permitted in general, by divers ancient statutes, whereof the first was statute Westm. 2, c. 10, that an attorney might be made to prosecute or defend any action in the absence of the parties to the suit. These attornies are now formed into a regular corps; they are admitted to the ex-

(*h*) Pope Boniface VIII. in 6 Decretal. 1. 3, t. 16, s. 4, speaks of *procuratores* "*qui in aliquibus partibus attornati nuncupantur.*"

(*i*) F. N. B. 25.

(*k*) *Ibid.* 27.

(*l*) Inst. 4, tit. 10.

ecution of their office by the superior courts of law and equity; and are officers of the respective courts in which they are admitted to practice: and, as they have many privileges on account of their attendance there, so they are peculiarly subject to the censure and animadversion of the judges (*m*). The duty of an attorney towards his client flows from his retainer, and he is liable for gross negligence in conducting the business which he undertakes (*n*).

Of advocates, or (as we generally call them) counsel, Counsel. there are two species or degrees; barristers, and serjeants. The former are admitted, subject to regulations before noticed (*o*), by the inns of court; and are in our old books styled apprentices, *apprenticii ad legem*, having been formerly looked upon as merely learners, and not qualified to execute the full office of an advocate till they were of sixteen years' standing; at which time, according to Fortescue (*p*), they might be called to the state and degree of serjeants (*q*), or *servientes ad legem*.

From amongst members of the outer bar some are from time to time selected to be her majesty's counsel learned in the law: the two principal of whom are called her attorney, and solicitor-general. The first king's counsel, under the degree of serjeant, was sir Francis Bacon, who was made so *honoris causâ*, without either patent or fee (*r*); so that the first of the modern order (who are now the sworn

(*m*) The law relating to attornies was consolidated by the 6 & 7 Vict. c. 73, and has been amended by stats. 7 & 8 Vict. c. 86; 14 & 15 Vict. c. 88; 23 & 24 Vict. c. 127.

(*n*) *Fray v. Voules*, 1 E. & E. 839; *Prestwich v. Poley*, 18 C. B., N. S. 806; *Chown v. Parrott*, 14 C. B., N. S. 74.

(*o*) *Ante*, vol. i. App.

(*p*) *De Leg.* c. 50.

(*q*) As to which see the late Mr. Serjeant Manning's learned work,

entitled "*Serviens ad Legem*." By custom the judges of the courts of Westminster are always admitted to the degree of the coif, before they are advanced to the bench; the origin of which was probably to qualify the puisné barons of the exchequer to become justices of assize, according to the exigence of the statute 14 Edw. 3, c. 116. Fortesc. c. 50.

(*r*) See his Letters, 256.

servants of the crown, with a nominal standing salary) seems to have been sir Francis North, afterwards Lord Keeper of the Great Seal to King Charles II. (s). These queen's counsel answer, in some measure, to the advocates of the revenue, *advocati fisci*, among the Romans. For they must not be employed in any cause against the crown without special licence: in which restriction they agree with the advocates of the fisc (t): but in the imperial law the prohibition was carried still further, and perhaps was more for the dignity of the sovereign; for, excepting some peculiar causes, the fiscal advocates were not permitted to be at all concerned in private suits between subject and subject (u). A custom has for many years prevailed of granting letters patent of precedence to such barristers, as the crown thinks proper to honour with that mark of distinction: whereby they are entitled to such rank and pre-audience as are assigned in their respective patents. These, as well as the attorney and solicitor-general (v), rank promiscuously with the king's counsel, and together with them sit within the bar of the respective courts; but receive no salaries, and are not sworn; and therefore are at liberty to be retained in causes against the crown. And all other serjeants and barristers indiscriminately may take upon themselves the protection and defence of suitors, who are therefore called their clients, as were the dependants upon the ancient Roman orators. Those indeed practised gratis, for honour merely, or at most for the sake of gaining influence: and so likewise it is established with us, that a counsel can maintain no action for his fees; which are given, not as *locatio vel conductio*, but as *quiddam honorarium* (x); not as a salary

(s) See his life by Roger North, 37; Manning's *Serviens ad Lægem*, 209, 210.

(t) Cod. 2, 9, 1.

(u) *Ibid.* 2, 7, 13.

(v) Seld. Tit. Hon. 1, 6, 7,

(x) *Kennedy v. Brown*, 13 C. B., N. S. 677; *Brown v. Kennedy*, 33 L. J., Ch. 71, 342; *Swinfen v. Lord Chelmsford*, 5 H. & N. 918.

or hire, but as a mere gratuity, which a counsellor cannot demand without doing wrong to his reputation (*y*); as is also laid down with regard to advocates in the civil law (*z*), whose *honorarium* was directed by a decree of the senate not to exceed in any case ten thousand sesterces, or about 80% of English money (*a*).

A counsel accordingly is to be considered not as making a contract with his client, which he is incapacitated from doing (*b*), but as taking upon himself an office or duty in the proper discharge of which not merely his client, but the court in which the duty is to be performed, and the public at large have an interest. The general conduct of, and control over, the cause are necessarily left to counsel, and he has complete authority over the suit, the mode of conducting it, and all that is incident to it; but not over matters collateral thereto (*c*). Moreover, in order to encourage due freedom of speech in the lawful defence of their clients, and at the same time to give a check to the unseemly licentiousness of prostitute and illiberal men (a few of whom may sometimes insinuate themselves even into the most honourable professions), it has been held that a counsel is not answerable for any matter by him spoken, relative to the cause in hand, and suggested in his client's instructions; although it should reflect upon the reputation of another, and even prove absolutely groundless: but if he maliciously mentions an untruth of his own invention, not pertinent to the cause, he may be liable to an action at suit of the party injured (*d*).

(*y*) See judgm. *Kennedy v. Broun*, *supra*.

(*z*) Dig. 11, 6, 1.

(*a*) Tac. Ann. 1, 11, 7.

(*b*) Judgm. *Kennedy v. Broun*, 13 C. B., N. S. 736.

(*c*) *Swinfen v. Lord Chelmsford*, 5 H. & N. 890; *Strauss v. Francis*,

1 L. R., Q. B. 379.

(*d*) *Hodgson v. Scarlett*, 1 B. & Ald. 232. So, if the counsel intentionally did a wrong or acted with fraud or trickery, he might incur liability; Judgm. 5 H. & N. 919.

Having thus briefly adverted to courts in general, we are next to consider the several species of courts by which justice is civilly administered in this country—the jurisdiction of each respectively, and the procedure appropriated therein for the redress of grievances.

CHAPTER IV.

THE COURT OF CHANCERY.

THE name of chancery, *cancellaria*, and of the judge who presides there, the Lord Chancellor, or *Cancellarius*, is derived, according to sir Edward Coke, and other ancient authorities (*a*), from *cancello*, because the highest exercise of his office is to cancel the king's letters patent when granted contrary to law, a patent or other record being vacated by drawing cross lines lattice-wise (*cancelli*, or cross bars) across it (*b*).

Chancery.
Derivation
of the word.

The office and name of chancellor (however derived) was certainly known to the Roman emperors, with whom it originally seems to have signified a chief scribe or secretary, who was afterwards an officer; to whose functions there were gradually added several judicial powers, together with a general superintendency over the other officers of the prince.

Office of
Lord Chan-
cellor, and
its history.

The Roman Church adopted, amongst other accessories of imperial state, this office, and hence every bishop has to this day his chancellor, the principal judge of his consistory court. When the modern kingdoms of Europe were established upon the ruins of the empire, almost every state preserved its chancellor, but the jurisdictions and dignities varied in the different states according to their several constitutions. In all of them he seems to have had the supervision of charters, letters, and such other public instruments of the crown as were authenti-

(*a*) 4 Inst. 88; Lambard Archeion, 46.

(*b*) See also Gibb. Decl. & Fall.

ii. 99; and 1 Campb. Lives of the Chancellors, ii. as to the various derivations ascribed to the name.

cated in the most solemn manner; when, therefore, the use of seals was adopted, in or about the time of Edward the Confessor (*c*), the custody of the king's great seal was naturally entrusted to the chancellor, and with him it has ever since remained (*d*). In the present day, the office of Lord Chancellor is created by the mere delivery of the great seal into his custody; he thereby becomes, without writ or patent, an officer of the greatest weight and power of any now subsisting in the kingdom, and superior in point of precedency to every temporal lord, except the king's sons, brothers, nephews, and uncles (*e*). He is invariably made a privy councillor, if not so previously (*f*); he is *virtute officii* prolocutor, or mouthpiece of the House of Lords, whether a peer or not (*g*), presiding as well over its legislative as its judicial sittings. To him belongs the appointment of all justices of the peace throughout the kingdom.

Being, in early times, usually an ecclesiastic (for none else were then capable of an office involving much knowledge of letters), and presiding over the royal chapel (*h*), he became, and is still, in a legal point of view, keeper of the king's conscience. He is also visitor, in right of the king, of all hospitals and colleges of the king's foundation. He also exercises the right of patronage of all

(*c*) See *ante*, vol. ii.

(*d*) It used to be said, that one Rembaldus who was called chancellor of Edward the Confessor, was the first in England who received that appellation (Ellesmere, Office of Chancellor, p. 12); but duties analogous to those of Edward's chancellor were certainly performed by a great officer or secretary of the king, whether called chancellor or not, in very much earlier times. See 1 Lord Campbell's Lives of the Chancellors, p. 3.

(*e*) Stat. 31 Hen. 8, c. 10.

(*f*) Selden (Office of Lord Chancellor, § 3) says that he is a privy councillor *virtute officii*; but see 1 Campb. Lives of the Chancellors, p. 16.

(*g*) Lord Ellesmere's Office of Lord Chancellor. Gilb. w. 42. If the lord chancellor be not a peer, he, although still president of the House of Lords, is not entitled to address the house or vote.

(*h*) Madox, Hist. of Exch. 42; 1 Campbell's Lives of the Chancellors, 4.

livings of the king that are of small value: this patronage, in early times, extended to all of the king's livings whose annual value was 20 marks or under, and was chiefly exercised in favour of the clerks in chancery, who were usually ecclesiastics (*i*): afterwards, the right of presentation, without any restriction, was assumed by the chancellors, and livings up to the value of 20*l.* in the king's book (*j*) were included in this right, which has continued to the present day; the livings being in fact now looked upon and dealt with, even by the legislature, as if the advowsons were vested in the Lord Chancellor as a corporation.

The Lord Chancellor is, by the jurisdiction inherent to his office, the general guardian of all infants, idiots, and lunatics (*k*), and has the general superintendence of all charitable foundations (*l*). The duties arising from this position of guardianship and superintendence are now shared by other judges, and, moreover, have, by recent legislature, been lessened by the establishment of other functionaries (*m*).

(*i*) See Christian's note to his edition of Blackstone's Commentaries, vol. iii. p. 48, n. 6. In order to make provision for the augmentation of the value of the chancellor's livings, an act has been recently passed to authorise the lord chancellor to sell the advowsons of certain livings, the price being applied in increasing their value. See the Lord Chancellor's Augmentation Act, 26 & 27 Vict. c. 120, under which a large number of the very small livings, the advowsons of which were vested in the lord chancellor, have passed into private hands.

(*j*) *I. e.*, the valuation made in the time of Henry VIII., under 26 Hen. 8, c. 3.

(*k*) A warrant under the sign manual committing the care of idiots and lunatics to the chancellor is usually given to him on his receiving the great seal, but it would seem that the jurisdiction is inherent in the office. See Campbell's Lives, 15. Some further information on the custody of idiots and lunatics and their property will be found in the next chapter.

(*l*) By 52 Geo. 3, c. 101, summary means for taking advantage of the control of the Court of Chancery have been provided. See *post*, p. 81.

(*m*) The Charity Commissioners, under 16 & 17 Vict. c. 137, now exercise a large control over endowed charities. As to what are

The Court of Chancery a court of record for letters patent, &c.

Officina brevium.

In addition to all these functions, the Lord Chancellor is the chief judge in the Court of Chancery, wherein there are two courts; the one ordinary, being a court of common law, the other extraordinary, being a court of equity (*n*). Though the Court of Chancery, in the most ancient times, was a court of record, for letters patent under the great seal were, and are always, recorded in the court (*o*), it was not originally a court where justice was administered; but from the very earliest times, out of the Court of Chancery, which has from this circumstance been called *officina brevium* and *officina justitiæ*, there have issued writs under the great seal directed to the king's justices or the sheriffs to give such remedy as the occasion required (*p*). When the circumstances of a case were similar to others that had preceded it, old established forms were, by the rule of the court, adopted; but when new cases arose, which could not be dealt with under any existing form of action, in order to prevent the harsh or imperfect judgment which might otherwise ensue, a new form of writ was sought for.

This was the custom not only among our Saxon ancestors before the institution of the *Aula Regia* (*q*), but also

endowed charities within their jurisdiction, see *Governors of the Charity for Relief of Clergymen's Widows v. Sutton*, 27 Beav. 651.

(*n*) In old times often called the Latin and the English sides of the court, from the languages employed in the pleadings respectively used. The bill in the equity side long continued to be called the English bill.

(*o*) "A patent is a record in chancery upon which a *scire facias* may issue, and it is a sufficient record whereon to found it." *R. v. Sir O. Butler*, 3 Lev. 223; Bac. Abr. tit. "Sci. Fa." C. 138; *Bynner v. The Queen*, 9 Q. B. 523. Letters patent

for invention, though issued out of chancery as being under the great seal, have long been treated in a different manner from other letters patent. The earliest statute regulating their grant is 18 Hen. 6, c. 1. It has been followed by a long series of statutes; the present general statute is 15 & 16 Vict. c. 83.

(*p*) *Mirror of Justice*, 176, ed. 1646.

(*q*) *Nemo ad regem appellet pro aliqua lite, nisi jus domi consequi non possit. Si jus nimis severum sit, alleviatio deinde queratur apud regem.* LL. Edg. c. 2. In very early times, the mode in which the

after its dissolution, in the reign of Edward I. (*r*), and, perhaps, during its continuance in that of Henry II. (*s*).

The chief judicial employment of the chancellor in these very early times, therefore, must have been in devising, with the assistance of his clerks, new writs directed to the courts of common law, to give remedy in cases where none was before administered (*t*). To quicken the diligence of the clerks in chancery, who were supposed to be too much attached to ancient precedents, it is provided by the statute of Westminster the second (13 Edw. 1, c. 24), that “whensoever from thenceforth a writ shall be found in the chancery, and in a like case falling under the same right, and requiring like remedy, no precedent of a writ can be produced, the clerks in chancery shall agree in forming a new one: and if they cannot agree, it shall be adjourned to the next parliament, where a writ shall be framed by consent of the learned in the law (*u*), lest it happen for the future that the court of our lord the

Statute of
Westminster 2.

relief was granted was by plaint to the king, who, with the assistance of his chancellor or secretary, framed a writ or letters to the judges: the most ancient form of such writ being as follows:—“*Rex, &c.* (to the judge.) *Questus est nobis A. quod B., &c., et ideo tibi (vices nostras in hac parte committentes) præcipimus quod causam illam audias et legitimo fine decidas.*” Mirror of Justice, p. 8.

(*r*) Lambard Archeion, 59.

(*s*) Joannes Sarisburiensis (who died A.D. 1182, 26 Hen. 2), speaking of the chancellor's office in the verses prefixed to his *Polycraticon*, has these lines:—

“*Hic est qui leges regni cancellat iniquas,
Et mandata pii principis æqua facit.*”

(*t*) See Chief Baron Gilbert's reasons for the institution of the *officina brevium*, History and Practice, p. 10.

(*u*) *I. e.*, the clerks or masters in chancery, of whom Fleta, lib. ii. ch. 12, says, “*Cui (cancellario) associantur clerici honesti et circumspecti Domino Regi jurati qui in legibus et consuetudinibus Anglicanis notitiam habent pleniorum quorum officium est supplicationes et querelas conquecentium audire et eis super qualitatibus injuriarum ostensurum debitum remedium exhiberi per brevia Regis;*” and elsewhere, “*Episcopi autem collaterales et socii cancellarii esse dicuntur præceptores eo quod brevia causis examinatis remedialia fieri præcipiant et hoc quandoque tam sive denariis ad opus Regis tam sive fine,*” &c.

king be deficient in doing justice to the suitors : " and the statute gives a variety of new precedents of writs, some of them for cases previously unprovided for. Thus is accounted for the number of writs of trespass on the case to be met with in the ancient register, whereby the suitor had relief according to the exigency, and adapted to the special circumstances and justice of his case (*x*).

In process of time, however, the chancellor came to do more than furnish the first ingredients of judicial action; he always sat as a member of the *Aula Regia*, and was accustomed generally to attend the king in person for the purpose, amongst other things, of giving him advice; indeed, he was doubtless the principal legal adviser on all occasions. It was natural, therefore, that he should early take cognizance of some legal matters, and especially those connected with rights depending upon the king's grants, since he, being the holder of the great seal, was the officer through whom they had been obtained. Thus arose the ancient common law jurisdiction of the chancellor. It is not possible to fix with exactness the time when it may be said first to have been completely established, but its authority is recognised in very early times (*y*).

Common
law jurisdic-
tion of the
court.

As a court of justice, it has now almost reached a fossil state, the only matters which for many years have been brought before it judicially being a few suits relating to patents for invention, but its ancient jurisdiction was to hold plea upon a *scire facias* (*z*) to repeal and cancel the

(*x*) Lambard Archeion, ed. 1635, p. 61. A discretion as to issuing a new form of writ has been called into exercise in times much more recent than that of Edward I. See *The Rioters' Case*, 1 Vern. 175.

(*y*) Lord Campbell supposes that the chancellor, during the existence of the *Aula Regia*, practically decided questions similar to those which

were afterwards recognised as coming within his common law jurisdiction, by that court referring such questions for his opinion; and he concludes that when the *Aula Regia* was broken up, the chancellor assumed the jurisdiction, and so established a separate court. *Lives of the Chancellors*, p. 6.

(*z*) The writ is *scire facias*, be-

king's letters patent of all kinds when made against law, or upon untrue suggestions (*a*), to hold plea of petitions of right (*b*), *monstrans de droit*, traverses of offices found upon inquisition of escheated lands or in lunacies (*c*), and the like, or when the king has been advised to do any act, or has been put in possession of lands or goods in prejudice of a subject's right (*d*).

Much of this jurisdiction of the chancellor seems but natural, because, since the king can never be supposed to do any wrong, if any error be proved to have arisen whereby a subject has suffered, the law assumes that, on due proof of it, he will give immediate redress, and a conscientious task like this would, of course, be performed by the chancellor, the keeper of his conscience.

The jurisdiction of the court extended over all personal actions where any officer or minister of the court was a party, over partitions (by *scire facias*) of lands in coparcenary (*e*), and, whilst military tenures existed, over claims for dower where any ward of the court was concerned in interest (*f*). It afterwards retained jurisdiction in cases relating to tithes of forest land, where granted by the king, and claimed by a stranger against the grantee of the crown (*g*), and over executions upon sta-

cause, as above stated, a patent is a record in chancery. The practice of issuing the same writ in similar cases, returnable in the King's Bench, seems to have first been established in Queen Anne's reign. *Brewster v. Wells*, 6 Mod. 230.

(*a*) Similar suits were afterwards sometimes instituted on the English side. See *Sawyer v. Vernon*, 1 Vern. 277, 370; and *Attorney-General v. Corporation of London*, 8 Beav. 270; 1 H. L. C. 440; 12 Beav. 8.

(*b*) Rastell's Entries, 461 a. (a)
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petition of right under 7 & 8 Hen. 8.)

(*c*) Yearbooks, 4 Edw. 4, 29 a.; 13 Edw. 4, 8 a.; 1 Hen. 7, 14 a. See *In re Ann Parry*, 35 L. J. Ch. 651; *In re Kane*, *ib. n.*

(*d*) 4 Rep. 54.

(*e*) Co. Lit. 171; Fitz. Nat. Brevium, 62. The writ of partition formerly issuing out of chancery is now abolished, 3 & 4 Will. 4, c. 27, s. 36.

(*f*) Bro. Abr. tit. Dower, 66; Moor, 565.

(*g*) Bro. Abr. tit. Dismes., 10.

Ancient
practice of
the Court.

tutes or recognisances in the nature of statutes, by the statute 23 Hen. VIII., c. 6 (*h*).

The proceedings in a suit in the common law court, when it was more used than is now the case, were not dissimilar to common law actions elsewhere. If, however, any cause came to issue, that is, if any fact were disputed between the parties, the chancellor having no power to summon a jury, could not try it (*i*), he then must deliver the record or a transcript of the record, *proprid manu*, into the Court of King's Bench, where it could be tried by the country, and judgment given thereon (*k*).

When judgment was given in chancery upon demurrer or the like, a writ of error in the nature of an appeal lay out of this ordinary court into the King's Bench (*l*). This right of appeal has been so little exercised, however, that Sir W. Blackstone said that he could find no

(*h*) 2 Rol. Abr. 469.

(*i*) The recent Act, 21 & 22 Vict. c. 27, s. 3, gives the Court of Chancery power to summon a jury. That Act, though probably not intended to affect procedure in the Petty Bag Office, still, is not in terms confined to the equity side of the court, and would therefore, seemingly, enable a suit in the Petty Bag Office to be completely tried there. By the Chancery Regulation Act, 1862 (25 & 26 Vict. c. 42) it is made obligatory upon the court to decide questions of fact (s. 1), unless it can be more conveniently tried elsewhere (s. 2). *Quære*, as to the effect of this upon a suit in the Petty Bag Office.

(*k*) Cro. Jac. 12; Latch. 112. There has been recently a case of revocation of letters patent for an invention, initiated by *scire facias* in the Petty Bag Office, *Bynner v. The Queen*, 9 Q. B. 523, in which

some points of practice were considered, but *quære* whether they are still the law.

(*l*) This is the opinion of Sir W. Blackstone (citing Yearbook, 18 Edw. 3, 25; 17 Ass. 24; 29 Ass. 47; Dyer, 315; 1 Roll. Abr. 287; 4 Inst. 80,) who remarks that a contrary opinion given by Lord Keeper North, in *R. v. Cary*, 1 Vern. 131, Eq. Ca. Ab. 129, pl. 9, *S. C.*, was not well considered. In *Foxwith v. Tremain*, 1 Vent. 162, one of the points resolved by the Court of King's Bench was that a writ of error did lie out of the Petty Bag into B. R. on an error in fact. See also *Bynner v. The Queen*, 9 Q. B. 523. Mr. Macqueen however, in his learned work on the Appellate Jurisdiction of the House of Lords (p. 369), contends that the only appeal is to the House of Lords.

trace of a writ of error being actually brought since the 14th year of Queen Elizabeth, A.D. 1572.

The proceedings in this court as a court of justice have, even in these few suits which we have mentioned, been long confined to the formal proceedings, such as the pleadings, the substantial trial of the merits being in the Court of Queen's Bench (*m*).

There have always been two branches of this common law court, one called the Court of the Hanaper, the other the Court of the Petty Bag. In the former, writs relating to the business of the subject, and the returns to them, were kept according to the simplicity of ancient times, in a hamper (*in hanaperio*). In the latter, those relating to matters wherein the crown was immediately or mediately concerned, were preserved in a little bag. The distinction between the two branches still exists, though the Petty Bag is the branch in which, for obvious reasons, most vitality remains. From it issue writs of what may be called a ministerial nature, such, for instance, as writs of election issued on calling a new parliament, writs of *congé d'élire* for the appointment of bishops and archbishops. In the Petty Bag Office, as a court of record, are kept the records of an endless variety of proceedings, not to be here enumerated; the above examples are sufficient illustrations of its present duties. We may add, however, the inrolment in chancery of deeds, such as disentailing deeds, which forms part of the duties of the common law side of the court. The practice and duties of the officers in the Petty Bag Office, and of the Inrolment Office have recently been regulated by the legislature (*n*).

Courts of
the Hanaper
and of the
Petty Bag.

The Extraordinary Court, or Court of Equity, has now become the court of the greater judicial consequence, and this in such a marked degree that many well-informed

The Extra-
ordinary
Court, or
Court of
Equity.

(*m*) But see the doubt suggested in a former note as to whether this is now the case.

(*n*) 11 & 12 Vict. c. 84, amended

by 12 & 13 Vict. c. 109. These acts do not specifically mention the Hanaper office.

persons are hardly, if at all, aware that the Court of Chancery possesses any judicial or administrative functions other than its equitable ones. Recent legislation has so far modified the practice, and added to the duties of the equitable side of the court, that the business transacted by it equals in extent that of the common law courts.

The distinction between law and equity, as administered in different courts in England, is not at present known, and seems not to have ever been known in other countries (*o*), though the difference of one from the other, when administered by the same tribunal, was perfectly familiar to the Romans (*p*), the *jus prætorium*, or discretion of the prætor, being distinct from the *leges* or standing laws (*q*); but the power of both centred in one and the same magistrate, who was equally entrusted to pronounce the rule of law, and to apply it to particular cases by the principles of equity.

With us, too, the *Aula Regia*, presided over by the chief justiciar, which was the supreme court of judicature, and in which all cases of importance were tried, undoubtedly administered equal justice according to the rule of both law and equity, or either, as the case might require. When this court was broken up, though there was no formal establishment of a court of equity, yet it is probable that some desire for freedom from the trammels of strict legal procedure would often be felt, which desire

(*o*) The Council of Conscience, instituted by John III. of Portugal to review the sentences of all inferior courts, and moderate them by equity (Mod. Un. Hist. xxii. 237), seems to have been rather a court of appeal than a court of distinct jurisdiction.

(*p*) Thus too the Parliament of Paris, the Court of Session in Scotland, and every other jurisdiction in Europe of which we have any

tolerable account, found all their decisions as well upon principles of equity as those of positive law. (Lord Kames' Hist. Law Tracts, i. 325, 330; Princ. of Equity, 44.)

(*q*) Thus Cicero: — "*Jam illis promissis non esse standum, quis non videt, quæ coactus quis metu et deceptus dolo promiserit? quæ quidem plerumque jure prætorio liberantur, nonnulla legibus.*" Offic. l. i.

would scarcely be disregarded. Still, though Bracton mentions equity as a thing contrasted to strict law (*q*), neither that writer nor Glanvil, nor the author of Fleta, nor even Britton (who wrote under the auspices, and in the name of Edward I., treating particularly of courts and their several jurisdictions), mentions anything about the chancellor's equitable jurisdiction.

Probably it was with the view of satisfying this desire that the statute of Westminster the Second was passed, which, by the ready issue of suitable writs, and with a little elasticity on the part of the judges, might probably have answered every purpose; indeed, opinions to this effect have been expressed by eminent judges (*r*). The only real want which might then have remained unsatisfied would have been that of obtaining discovery upon oath from the defendant (*s*).

It seems, however, that notwithstanding the varied forms of actions so devised, and the means afforded for further developement, courts of law, through a too rigorous adherence to established forms, and the letter rather than the spirit of law, still fell short of administering that complete relief which a natural sense of justice seemed to require. No satisfactory reason can be given why this should have been the case; certainly in modern times courts of law do not exhibit the same narrowness of spirit, and they have long rejected some of the old rigid rules: still, they have, naturally, been unable in many instances entirely to disregard the authority of ancient precedents, and it is but very recently that they have

(*q*) l. 2, c. 7, fol. 23.

(*r*) "*Le subpoena ne serroit my cy souventement use come il est ore, si nous attendomus tiels actions sur les cases et mainteinomus le jurisdiction de ceu court et d'auter courts.*" *Per* Fairfax, a learned judge of Edward the Fourth's time. See Yearbook, 21 Edw. 4, 23.

(*s*) This important requisite for the attainment of justice might have been provided by the legislature in common law courts somewhat before the time (1854) when it was actually furnished. (See Common Law Procedure Act, 1854, s. 51.)

received any adequate aid from the legislature. But, whatever may have been the reason, a court of equity was found to be a necessity, if complete justice was to be obtained.

An important influence towards its establishment came into operation, when in the 14th century (*t*) there grew up new doctrines concerning the holding and enjoyment of property, separating the legal title from the right to the beneficial enjoyment of it, in imitation to some extent of the usufructus of Roman law, though arising out of causes peculiar to the age. With the growth of these doctrines there arose a necessity or desire for the judicial recognition of trusts or uses, as they were commonly called (*u*). The device of one person having the legal dominion over property, but bound to allow another to have the full benefit of it, was found to meet and overcome several obstacles which the law had imposed upon the disposition of landed property. Of these, perhaps, the most notable was the law of mortmain, prohibiting lands from being given for religious purposes. Ecclesiastical chancellors, therefore, readily sanctioned the plan of avoiding these statutes, by vesting the legal estate of lands in persons to the use of the religious houses, and then, by binding the conscience of the legal owner to give effect to the use. And since the jurisdiction to enforce this obligation was refused by court of law (*v*), it was assumed by the Court of Chancery. The invention of the writ of subpœna, returnable only in the Court of Chancery, by which the feoffee to uses was made account-

(*t*) 1 Sand. Uses, 12.

(*u*) It has been commonly thought that the jurisdiction over trusts was one of the principal causes of the equitable jurisdiction being assumed by the Court of Chancery. Lord Campbell, however, gives reasons for believing that it did not play so important a part in this matter as was supposed. Still it must have

had much to do with the determination with which the chancellors adhered to their power when once assumed. See Lord Campbell's *Lives of the Chancellors*, p. 10.

(*v*) Not, however, without some occasional wavering. See *Jeron v. Bush*, 1 Vern. 349, and note (3) to that case.

able to his *cestui que use* is ascribed to the "subtilty" of John de Waltham, Bishop of Salisbury, and chancellor to Richard II. (x). This writ, requiring the defendant to appear to and answer a bill of complaint in the Court of Chancery, continued from that time until very recently, to be the foundation of a chancery suit. It was originally framed under a strained construction of the above-quoted statute of Westminster the Second; but the process having been found to answer well the ends of those who used it, the practice of issuing it was soon extended to many cases, even to some which were properly determinable at common law; a false and fictitious suggestion being made in the bill that common law furnished no relief. To remedy this, which was thought to be an evil, the statute 17 Rich. 2, c. 6, was passed, by which the chancellor was directed to award damages to the party unjustly vexed by such a proceeding. It may be noticed that the clergy so early as the reign of King Stephen had attempted to turn their ecclesiastical courts into courts of equity, by entertaining suits, *pro læsione fidei*, as a spiritual offence against conscience, in case of non-payment of debts or breach of civil contract (y), and these attempts were continued till they were checked by the Constitution of Clarendon (z), which declared that "*placita de debitis quæ fide interposita debentur, vel absque interpositione fidei sint*

(x) Rot. Parl. 3 Hen. 5, n. 46; Spelm. Glos. 106; 1 Lev. 242; 1 Roll. Abr. 371. John de Waltham was master of the rolls, but had the great seal entrusted to him on several occasions. Rymer, vii. 362, 381, 496, 510. From the invention of trusts and the exclusive control which the court of equity took of them, there naturally grew up that vast administrative business by which family estates and property are preserved and managed under the direction of the court,

which now occupies so large a portion of its attention. The policy of recent legislation is to continually add to this part of the court's duties, the exercise of judicial discretion being clearly most beneficial to those persons who occupy the position of guardians, and those (such as infants) who are entitled to the enjoyment, yet incapable of the management of property.

(y) Lord Lytt. Hen. 2, b. 3, p. 361.

(z) 10 Hen. 2, c. 15; Speed, 458.

in justitia regis." Yet even after this enactment the spiritual courts continued to grasp at the same authority (a) down to so late a time as the fifteenth century (b), till finally prohibited by the unanimous consent of all the judges.

Jurisdiction
assumed by
the Chan-
cellors.

The fact is undoubted, and the reasons are sufficiently apparent, that the chancellors clung to, and sought to extend, the jurisdiction which they had acquired, and they succeeded in doing this, notwithstanding that repeated efforts were made to put an end to their power. We find that in the reigns of Henry IV. and Henry V. (c), there were several petitions presented by the commons to the king, urging the suppression of the writ of subpœna as a novelty contrary to the form of the common law, whereby, as they declared, no plea could be determined unless by examination and oath of the parties, according to the form of the civil law, and the law of holy church, but in subversion of the common law. Henry IV., feeling perhaps not too secure on his throne, evaded these requisitions, or even, to some extent, acceded to them (d); but Henry V. gave a decided negative to the application, and the process by writ of subpœna and bill in chancery then became,

(a) In 4 Hen. 3, suits in court christian *pro lacione fidei* upon temporal contracts were adjudged to be contrary to law. (Fitzh. Abr. tit. Prohibition, 15.) But in the statute or writ of *circumspecte agatis*, supposed by some to have issued 13 Edw. 1, but more probably (3 Pryn. Rec. 336) 9 Edw. 2, suits *pro lacione fidei* were allowed to the ecclesiastical courts, according to some ancient copies, (Berthelet, Stat. Antiq. Lond. 1531, 90, b.; 3 Pryn. Rec. 336), and the common English translation of that statute, though in Lyndewode's copy (Prov. l. 2, t. 2), and in the

Cotton MS. (Claud. D. 2), that clause is omitted.

(b) Yearbook, 2 Hen. 4, 10; 11 Hen. 4, 88; 38 Hen. 6, 29; 20 Edw. 4, 10.

(c) Rot. Parl. 2 Hen. 4, 69; 4 Hen. 4, 78 & 110; 3 Hen. 5, 46, cited in Prynne's Abridg. of Cotton's Records, 410, 422, 424, 548. See 4 Inst. 83; 1 Roll. Abr. 370, 371, 372.

(d) See 4 Hen. 4, c. 23, by which judgments at law were made irrevocable, except by attainr or writ of error, and not to be impeached in equity. Doctor and Student, Dial. 1, c. 18.

and continued to be, until the year 1852 (*e*), the daily practice of the court, its application being constantly extended.

Equitable jurisdiction of some kind was, no doubt, exercised before the time of John de Waltham's writ, but it seems to have been the first instance of process issued out of the Court of Chancery without special commission from the king, or special authority derived from parliament (*f*), for the purpose of enforcing equitable rights by the authority of that court alone. Thus was established, in addition to his ordinary power (*potentia ordinata*), the extraordinary or absolute power (*potentia absoluta*) (*g*) of the chancellor, in the exercise of which he disregarded the ordinary rules of procedure in courts of law (*h*), adopted such means, by examination on oath of the parties or otherwise, as seemed best calculated to discover the truth, and enforced obedience to his decrees by imprisonment. The chancellors did not, and probably felt that they could not, assume all the powers which were exercised by courts of law; such, for instance, as summoning a jury to determine questions of fact, and this became one of the principal defects of the court, which have recently been rectified. In its judgment, the Court of Chancery, whilst adhering to those rules of law which were consonant with principles of equity, boldly overruled those rules or maxims of almost absurd and fanciful rigour which had been laid down and pertinaciously adhered to by judges, notwith-

(*e*) See 15 & 16 Vict. c. 86, s. 2.

(*f*) Lord Campbell gives an instance, taken from the Close Rolls, of a suit for specific performance in 40 Edw. 3, where the plaintiff petitioned the king in parliament, who caused the defendant to come before the chancellor, the treasurer, the justices, and other sages; and he states that the records of the court of chancery contain other instances still earlier of the exercise

of equitable jurisdiction, though none so early of compelling the execution of a trust. Lives of Chancellors, 8 n.

(*g*) Ellesmere, 44.

(*h*) Though the procedure which grew up in chancery was far from being free from reproach. See, for instance, the table of processes to compel appearance and answer exhibited in page 152 of the Report of the Chancery Commission, 1826.

standing that through the accidents or necessities of social life they in fact often worked great injustice (*i*).

The relief given, as compared with that now obtained, did not, however, for a long time extend very far; for in the ancient treatise entitled *Diversité des courtes*, or Diversity of courts and their jurisdictions (*k*), written by an unknown author in the time of King Henry the Eighth, we have a catalogue of the matters of conscience then cognisable in chancery, and these fall within a very short range (*l*). No regular judicial system or rules of equity at that time prevailed in the court. A suitor who thought himself aggrieved could but obtain a desultory and uncertain remedy according to the private opinion of the chancellor (*m*), generally, and as we have already remarked in very early times always, an ecclesiastic, sometimes, though rarely, a statesman, scarcely ever a lawyer. From the times of the chief justices Thorpe and Knyvet, successively chancellors to King Edward III. in 1372 and

(*i*) Such as the rule that a debt or other chose in action shall not be assigned: notwithstanding what Lord Coke says—"The great wisdom and policy of the sages and founders of our law have provided that no possibility, right, title, nor thing in action shall be granted or assigned to strangers, for that would be the occasion of multiplying of contentions and suits, of great oppression to the people, and chiefly of terre tenants, and the subversion of the due and equal execution of justice." *Lampel's Case*, 10 Rep. 48. See, as to the present policy of the legislature, 30 & 31 Vict. c. 144, which gives to assignees of a policy of life assurance the right to sue at law in their own name; and the similar act relating to marine insurances, 31 & 32 Vict. c. 86.

(*k*) See title-page of English edi-

tion, 1646.

(*l*) Tit. Chancery, p. 296, Rastell's edit. 1534; p. 293, English edit. 1646.

(*m*) "Equity is a roguish thing. For law, we have a measure, and know what to trust to; equity is according to the conscience of him that is chancellor; and as that is larger or narrower, so is equity. 'Tis all one as if they should make the standard for the measure a chancellor's foot. What an uncertain measure would this be! One chancellor has a long foot, another a short foot, a third an indifferent foot. It is the same thing with the chancellor's conscience." (Selden's Table Talk, tit. Equity.) This, though scarcely just at the time it was written, might with more truth be applied to the early exercise of the court's jurisdiction.

1373, till the promotion of Sir Thomas More by Henry the Eighth in 1530, no lawyer sat in the Court of Chancery (*n*). After this time the great seal was indiscriminately committed to the custody of lawyers, courtiers (*o*), and churchmen (*p*), according as the convenience of the moment, or the caprice of the sovereign, might require, until, in 1592, Serjeant Puckering was made lord keeper, from which time to the present the Court of Chancery has always been filled by a lawyer; except that during the interval from 1621 to 1625 the seal was entrusted to Dr. Williams, then Dean of Westminster, but afterwards Bishop of Lincoln, who had been chaplain to Lord Ellesmere when chancellor (*q*). But it is only in very recent times that men have, as a general rule, been made judges in the Court of Chancery who have specially devoted their study to the doctrines of equity as distinguished from the rules and practice of common law courts. Equity lawyers are of very modern extraction (*r*).

The establishment of a series of rules and precedents guiding and controlling the judgment of equity judges, and, to a great extent, excluding the application of any peculiar personal notions of justice, at the same time extending and defining the nature of the relief which the Court of Chancery will, and which a court of common law will not, grant, has been gradual. Among other *questiones vexatæ*, one great one occurred as to the power of the Court of Equity to interfere with judgments or proceedings in courts of law, a notable dispute as to which was set on foot by Sir Edward Coke, then chief justice of the Court of King's Bench. That distinguished

Assumption
of power
over Com-
mon Law
Courts.

(*n*) Spelm. Gloss. 111; Dugd. Chron. Ses. 50.

(*o*) Wriothesly, St. John, and Hatton.

(*p*) Goodrick, Gardiner, and Heath.

(*q*) Biog. Brit. 4278.

(*r*) It is said that when Lord Eldon first practised at the bar, there were but twelve or fifteen counsel regularly practising at the chancery bar. Twiss's Life of Lord Eldon, p. 117.

judge strenuously contended against the assumption which was made on the part of a court of equity to restrain by injunction, *i. e.*, on pain of imprisonment, a complainant at law from pursuing his remedy at law, and reaping the fruits of his success.

This contest, which took place when Lord Ellesmere was chancellor (A.D. 1616), was so warmly carried on, that indictments were preferred against the suitors, the solicitors, the counsel, and even a master in chancery, for having incurred a *præmunire* by questioning in a court of equity a judgment in the Court of King's Bench obtained by gross fraud and imposition (*s*).

This matter being brought before the king, was by him referred to his learned counsel for their advice and opinion, who reported so strongly in favour of the courts of equity (*t*), that his majesty gave judgment on their behalf; but, as might be expected from King James's character, he, not content with the irrefragable reasons and precedents produced by his counsel (for the chief justice was clearly in the wrong), chose rather to decide the question by referring it to the plenitude of his royal prerogative (*u*). Sir Edward Coke submitted to the decision (*x*), and thereby made atonement for his error; but this struggle, together with the business of *commendams* (in which he acted a very noble part) (*y*), and his conduct

(*s*) Bacon's Works, iv. 611, 612, 613.

(*t*) Whitelock on Parl. ii. 390; 1 Ch. Rep. Append. 11.

(*u*) "For that it appertaineth to our princely office only to judge over all judges, and to discern and determine such differences as at any time may and shall arise between our several courts touching their jurisdictions, and the same to settle and determine as we in our princely wisdom shall find to stand most with our honour," &c. 1 Ch.

Rep. Append. 26. Williams, *Jus Appellandi*, p. 123.

(*x*) See the entry in the council book, 26 July, 1616; Biog. Brit. 1390.

(*y*) In a cause of the Bishop of Winchester, touching a *commendam*, King James conceiving that the matter affected his prerogative, sent letters to the judge not to proceed in it till himself had first been consulted. The twelve judges joined in a memorial to his majesty declaring that their compliance would

relative to the commissioners of sewers in insisting upon their being subject to the control of the Court of King's Bench were the open and avowed causes (*x*) first of his suspension and then of his removal from office.

Lord Bacon, who succeeded Lord Ellesmere, reduced the practice of the court to a more regular system (*a*); but did not sit long enough to effect any considerable revolution in the science of equitable jurisprudence itself, and few of his decrees that have reached us are of any great consequence to posterity.

His successors, in the reign of Charles I., did little to improve upon his plan. Lord Clarendon, when the seal was committed to him, had withdrawn from practice as a lawyer nearly twenty years (*b*), and the Earl of Shaftesbury, who received it on Clarendon's fall, though a lawyer by education, had never practised at all. But somewhat later there was a change, when, in 1673, Sir Heneage Finch, afterwards Earl of Nottingham, became chancellor. He was a person of the greatest abilities and most incorruptible integrity, a thorough master and zealous defender of the laws and constitution of his country. His genius enabled him to discover the true spirit of justice, notwithstanding any embarrassments raised by the narrow and

be contrary to their oath and the law. But upon being brought before the king and council they all retracted and promised obedience in every such case for the future, except sir Edward Coke, who said, "that when the case happened he would do his duty." Biog. Brit. 1388.

(*z*) See Lord Ellesmere's speech to sir Henry Montague, the new chief justice, 15 Nov. 1616. (Moor's Reports, 828.) Sir Edward Coke might probably have retained his seat, if during his suspension he would have complimented Lord Villiers (the new favourite) with the disposal of the most lucrative office

in his court. Biog. Brit. 1391.

(*a*) He appears to have published, about the year 1618, a collection of orders, comprising the more important rules of practice which had previously obtained. See Chancery Commission Report, p. 10.

(*b*) Lord Clarendon's Orders as to Practice, published in 1661, which, however, were little more than copies of those published in 1656 by the Lords Commissioners Whitelock, Lenthall, and Keeble, continued in force as regulating the practice of the court until very recent times.

technical notions prevailing in courts of law, and the imperfect ideas of redress then recognised in courts of equity. The reason and necessities of mankind, arising from the great change in property by the extension of trade, and the abolition of military tenures, co-operated in establishing his plan, and enabled him to build up, in the course of nine years, a system of jurisprudence and jurisdiction upon wide and rational foundations. This has been extended and improved by the many great men who have since presided in chancery, and constitutes a noble monument to their memory, *monumentum ære perennius*. The great variety in the necessities, the desires, and the habits of society, and the craft of men following the increase of riches, rendered the comparatively simple procedure of courts of law inadequate for the complete administration, though often well adapted to the ordinary administration of justice; and this led, as we see, to the application for an adequate remedy to the jurisdiction of the Court of Equity, and thereby to the establishment of that jurisdiction. Now this application was always in the form of a petition of the party aggrieved, stating the grievance, the defect of remedy in the courts of common law, and mentioning the remedy which it was conceived ought to be administered. By the nature of most of such cases, a part of this remedy consisted in the unravelment of a long chain of fraud, the examination of complicated accounts, or the administration of large properties; the mere enumeration of these seems suggestive of cumbrous machinery, and it must be admitted as a fact, that the procedure which grew up in the court, though powerful to redress wrong, was also often, and this from an almost excess of caution, attended with such delay and expense as almost to defeat its own objects. This was a grievance not likely to escape the reforming spirit of the present century. It was easily recognised that whilst the motive vital power of the court might be developed and expanded, the weight of its machinery,

which bore it down and diminished its efficacy, might be with safety lessened. Accordingly, in 1824, a royal commission was appointed to consider whether any alterations might advantageously be made in the practice of the court so as to abridge the expense and time attending proceedings in the court. This commission, in 1826, made an elaborate report, and since that time numerous statutes have been passed for the purpose of remodelling the procedure, and correcting errors, or supplying deficiencies in the various offices of the court (*c*). By abolishing many useless forms and requisitions, due to an over anxiety for the prevention of injustice, by retaining only those rules of practice which involve the essence of the administration of justice, by adding further powers to the court, a reform has been carried out to such an extent that we may safely affirm, that at the present day the Court of Chancery is nearly as free from reproach on the score of useless formalities, expense, and delay, which bring disappointment to the suitor, as it has ever been in regard to the purity of the principles governing its decisions. We shall presently recur to this subject in the course of giving an outline of the present procedure by suit. We have, in what we have said, sufficiently traced in outline the history of the establishment of the court as a court of equity, presided over by the Chancellor, Lord Keeper, or Lords Commissioners for the custody of the great seal (*d*). It remains to say somewhat concerning the other officers and the present subdivision of judicial labour.

In addition to the Lord Chancellor, there has been from

(*c*) See 2 Will. 4, c. 33; 2 & 3 Will. 4, c. 111; 5 & 6 Vict. c. 103; 3 & 4 Vict. c. 94, amended by 4 & 5 Vict. c. 52; 5 Vict. c. 5; and 8 & 9 Vict. c. 105; 11 & 12 Vict. c. 10; 13 & 14 Vict. c. 35; 14 & 15 Vict. cc. 4, 83; 15 & 16 Vict. c. 86, amended by 17 & 18 Vict. c. 100, and 18 & 19 Vict. c. 134; 15 & 16 Vict. c.

87, amended by 16 & 17 Vict. c. 98; 16 & 17 Vict. cc. 22, 78; 21 & 22 Vict. c. 27; 23 & 24 Vict. c. 149; 25 & 26 Vict. c. 42; and other statutes cited below.

(*d*) As to the authority of a lord keeper, see 5 Eliz. c. 18; and as to that of lords commissioners, see 1 W. & M. c. 21.

The Master
of the Rolls.

the earliest existence of the court (*e*), an officer called the Master of the Rolls, to whom the custody of the records, or rolls of the court, was entrusted. It appears, however, that his duties always extended beyond those merely of a conservator to the superintendence of the issue of writs (*f*), and there seems no doubt that he in very early times took part in the judicial administration, not only of the common law, but also of the equity side of the court (*g*), though as to the exact extent of his authority there has been much controversy (*h*); but it is certain that he in later times acted as a judge, subordinate in authority to the Chancellor, his decisions being subject in some degree to modification by the Chancellor. In order to remove the doubt as to his authority in hearing and determining causes, an act was passed in the reign of Geo. II. (3 Geo. 2, c. 30), by which it was declared that all orders and decrees made by him, except such as by the course of the court were appropriated to the great seal alone, should be deemed to be valid, subject nevertheless to be discharged or altered by the Lord Chancellor, so as they should not be inrolled until signed by his lordship. The business disposed of by him continued, however, to be of limited character (*i*) until another act, passed more recently (3 & 4 Will. 4, c. 94), has further declared what judicial power

(*e*) In the earliest notice of a master of the rolls extant in the records of the court, it is said that the custody of the rolls of chancery was committed to Adam de Osodby, "*ita quod custodiam illam eodem modo habent quo alii custodes eam habere consueverunt temporibus retroactis.*" Thus indicating the then ancient nature of the office. Rot. Claus. 23 Edw. 1. See also 2 Com. Dig. 208.

(*f*) 4 Inst. 82; Registrum Brevium, 7.

(*g*) See a Discourse of the judicial

authority belonging to the office of the Master of the Rolls, 2nd edit. 1728. This work is ascribed to Lord Hardwicke. (Harris's Life of Lord Hardwicke, vol. i. p. 195.)

(*h*) In several instances in the reign of Henry VIII. the Master of the Rolls was styled Vice-Chancellor. See Discourse, &c., p. 20.

(*i*) And extent also, for at the time, in 1813, when the office of Vice-Chancellor of England was instituted, the Master of the Rolls only held his sittings in the evening.

should be exercised by the Master of the Rolls; and under this act he now has complete power, as a judge, of primary jurisdiction.

Besides the Lord Chancellor and the Master of the Rolls, there were from very early times numerous officers Other ancient officers. having duties connected with both the common law and equity sides of the court. These offices (*k*) have, however, for the most part been abolished, and of those which remain the duties have been so far modified that it is unnecessary to do more than refer to them.

The vast increase of business in the court under the circumstances which have been already alluded to, and the great necessity which was felt for the more speedy despatch of that business, led to the appointment of a new judge, as a further assistant to the Lord Chancellor, under the title of Vice-Chancellor of England (*l*). His decrees Vice-Chancellor of England. and orders were, like those of the Master of the Rolls, subject to the revision of the Lord Chancellor.

Subsequently, in the year 1841 (*m*), when the equitable jurisdiction which had previously been exercised by the

(*k*) The masters in chancery were the principal of the subordinate officers, being appointed by letters patent. They were "for the most part doctors of the civil law, and do assist the court to show what is the equity of the civil law." (Ellesmere's Office of the Lord Chancellor, 37. See, also, 4 Inst. 82; Smith's Commonw. bk. ii. c. 12.) Their duties in very early times were, as before stated, mostly connected with framing writs; in later times, they transacted the greater part of the ministerial business, such as prosecution of inquiries into pedigrees, accounts, &c. Their offices, after being regulated by 3 & 4 Will. 4, c. 94, and 10 & 11 Vict. c. 60, were abolished by 15 & 16 Vict. c. 80, being replaced by the

chief clerks of the judges. Other ancient officers were the cursitors, whose offices were similar in character, but of inferior importance to the ancient masters, being the framers of those writs which were in common form (*brevia de cursu*), and the six clerks, who acted as attorneys on behalf of the suitors. See a Treatise on the Practice of the Court of Chancery, London, 1672, p. 66; and Gilbert's History and Practice, p. 9.

(*l*) See 53 Geo. 3, c. 24.

(*m*) See 5 Vict. c. 5; 14 Vict. c. 4; and 15 & 16 Vict. c. 80; by the last of which acts (s. 52) perpetual authority was given to fill up vacancies in the number of Vice-Chancellors.

The Vice-
Chancellors.

• Court of Exchequer was transferred to the Court of Chancery, two more Vice-Chancellors were appointed. At that time the Master of the Rolls had complete authority to hear and determine causes at all their stages, so that there were thus constituted four courts of primary jurisdiction of equal authority, but the decisions of all subject to appeal. The business of hearing appeals from these courts of primary jurisdiction soon became the principal duty of the Lord Chancellor, whilst sitting in chancery, and he has for some time confined his attention almost exclusively to it. The labour of this appellate business is now shared by two judges, called the Lords Justices of the Court of Appeal in Chancery, who, with the Lord Chancellor, now form the Court of Appeal in Chancery. This court was constituted in the year 1851 (*n*); it possesses and exercises all the jurisdiction previously possessed by the Lord Chancellor, and exercises and performs all powers, authorities, and duties, as well ministerial as judicial, incident to such jurisdiction, and also any which recent legislation may have added to those formerly belonging to the Lord Chancellor sitting in the Court of Chancery.

The functions of the Court of Appeal may be exercised not only by the full court of the three judges, but by the Lord Chancellor alone (who, it may be observed, retained his former jurisdiction unaffected (*o*)), or by the Lord Chancellor sitting with one Lord Justice, or by the Lords Justices sitting together, apart from the Lord Chancellor (*p*). And by a still more recent act, power is given to each of the Lords Justices to sit separately as a Court of Appeal, for the purpose of hearing appeals from interlocutory orders of the primary courts (*q*).

The obvious advantages which result from the union of the two principles of justice, law and equity, so as to

(*n*) See 14 & 15 Vict. c. 83, ss.
1, 3, 5.

(*p*) *Ib.*

(*o*) 14 & 15 Vict. c. 83, s. 11.

(*q*) 30 & 31 Vict. c. 64, amended
by 31 Vict. c. 11.

enable one tribunal completely to dispose of a case before it, have of late been much insisted upon, and there is a great tendency to give jurisdiction to courts of equity to deal with a case with the same powers and means of redress that courts of law have, and correlatively to give courts of law some equitable jurisdiction, each court retaining, however, its original distinctive character in respect of its primary functions.

Courts of equity have by recent acts been successively enabled (*r*) and required (*s*) to determine questions of law in cases where it was the old practice to require them to be decided by a common law court; moreover, the novel power has been given (*t*) to summon juries for the determination of questions of fact and the assessment of damages, in certain cases, instead of granting an injunction against breach of contract or continuance of a wrongful act, or of granting specific performance of a contract. These enactments, by giving the Court of Chancery the power of dealing with a case in the same manner as a court of law would do, render its powers, in such cases, as complete as those possessed by the Roman Prætors. Again, by another act (*u*), courts of common law have power given them to a limited extent to deal with equitable grounds of defence to an action, and also to grant, in some cases, similar relief by injunction to that which the Court of Chancery alone previously granted.

It must not, however, be supposed that by the changes we have just mentioned, the Court of Chancery has become a court both of law and equity for all cases; otherwise, it would, of course, be the only court to which suitors would ever resort in important cases, which is not the fact. The rule has been laid down (*x*), that unless some relief is sought of the peculiar character which

(*r*) 15 & 16 Vict. c. 86.

(*s*) 25 & 26 Vict. c. 42.

(*t*) 21 & 22 Vict. c. 27.

(*u*) 17 & 18 Vict. c. 125.

(*x*) *Durell v. Pritchard*, L. R. 1 Ch. 244; *Ferguson v. Wilson*, L. R. 2 Ch. 77 (see pp. 88, 91).

alone the court could formerly grant, and unless there is a proper case for such relief, the court will not interfere. A similar remark applies to the common law courts. They have only a limited power of dealing with equitable doctrines. Besides, the practice and mode of procedure, as we shall hereafter see, are still entirely distinct. There is, therefore, at present, no fusion of the two courts, and it remains equally important, now as formerly, to understand the distinction between law and equity, and the nature of the redress obtained in one court and in the other. To explain the principles which govern a court of equity, and regulate its decisions, and which are not recognised by a court of law as legal doctrines, and to show the character of the relief which a court of equity gives as distinguished from that which is obtained in a court of common law, will be our next task. It is, however, one of great difficulty, because we are necessarily precluded from giving that complete and exhaustive account of the doctrines of equitable jurisprudence, which alone will completely separate and distinguish those doctrines on the one side from the more rigid rules adopted in common law, and on the other from the principles of natural morality, which must be left to the enforcement of the conscience alone, such as charity, or gratitude.

CHAPTER V.

THE EQUITABLE JURISDICTION OF THE COURT OF CHANCERY.

IN the course of tracing the history of the Court of Chancery as a court with equitable jurisdiction, it has been inevitable that we should occasionally refer to some of the principles of equity which govern its decisions. The subject is, however, worthy of some further notice. But since equitable jurisprudence, as now established, is of so vast and yet refined a character that it would be wholly impossible, within the limits of this work, even to trace to its source each leading principle, much less follow the course of decisions in all the various ramifications into which those principles spread, we must be content, abandoning the historical method, with an endeavour to exhibit a general outline of the present jurisdiction of the court, and the nature of the relief granted; and we shall afterwards give a short account of the mode in which, by suit and other proceeding, that jurisdiction is exercised.

Although the nature of equitable jurisprudence is now defined by rule and precedent with very considerable exactness (*a*), so that cases do not frequently occur in which there is any serious dispute whether or not this court ought to assume jurisdiction in exclusion of that of common law courts, yet it is by no means easy—or rather we may say it is impossible—to give any general description or definition which shall at once be brief, intelligible,

Equitable jurisprudence is definite, yet not easily defined with brevity and accuracy.

(*a*) See *Bond v. Hopkins*, 1 Sch. & Lef. 428.

Attempted
definitions.

and even approximately accurate. Such an attempt has often been made, never with a satisfactory amount of success.

Equity
abates the
rigour of
the law.

Thus it has been said (*b*) that it is the business of a court of equity in England to abate the rigour of the common law; and, undoubtedly, there have been cases where equitable interference has had this effect; but all the rules of common law which equity has so taken upon itself to overrule have long since been well defined, and many of them have ceased, even at common law, to govern the judgments of the court (*c*). In illustration of this, and as an instance of a change in rules of law, due to the establishment of equitable doctrines, we may mention what has taken place as to penal bonds. Bonds appear to have originally been invented to evade the absurd law prohibiting the taking of interest for money lent. If a debtor failed to repay the principal money and interest, since judgment could not be given for interest, the penalty might, with some show of justice, be demanded specifically. And courts of law held this. Unfortunately, they continued to act upon this view after the payment of interest became legal; and even after the statute 37 Hen. 8, c. 9, had declared the debt to be the "just and true intent" of the parties to the contract, they refused to consider the payment of principal, interest, and costs, as a full satisfaction of the bond. Now, it is clear that the object of parties in an ordinary case of a bond is not to provide the penalty as a compensation for default, but to secure that default should not be made. If, there-

Equitable
doctrine of
penalties
adopted by
courts of
law.

(*b*) Lord Kames' *Princ. of Equity*,
44.

(*c*) In addition to the case mentioned in a former note and in the text, we may add those ancient and now obsolete rules referred to by Lord Campbell, as instances of "absurdities of common law judges," viz., that no action could be main-

tained, or a claim founded, upon a deed detained in the hands of another; and that if a deed of grant were lost, the thing granted was lost with it; that a man was liable to pay money due by deed twice over, if on payment he omitted to take an acquittance under seal.

fore, after default in the strict performance of the duty contracted for, and in respect of which the penalty is imposed, the defaulter can substantially place the other party in as good a position as if no default had occurred, which may often happen, it is unfair and harsh to enforce the penalty. Accordingly, equity interfered in aid of the obligor (*d*). Similar remarks apply to the forfeiture of mortgaged lands, because the only object of a mortgage is a security for the repayment of money with interest, and therefore a forfeiture of the lands ought not actually to take place until it is proved, in the most definite manner, that the money cannot be repaid. These equitable principles, after long being acted upon in the Court of Chancery, were, like several others (*e*), at last forced upon courts of law by the legislature (*f*).

The educational course which thus, it seems, courts of equity have furnished to courts of law has been long so far completed that no new doctrines in equity opposed to the rules or doctrines of courts of law have been established. Nor does equity ever now profess to criticise or review decisions of courts of law; moreover, it does not, and never did, interfere to mitigate the severity, when any exists, of rules of positive law. For instance, it never was the business of the court of equity to relax the law which formerly existed in this country that lands descended to the heir free from any liability to the simple contract creditors of the ancestor; or the rule that a father or other ancestor should never succeed to the lands of his son; or, again, the rule by which a half-brother was postponed in the inheritance of land to a remote relation of the whole blood. These rules were, unquestionably, unjust, and have been abrogated by the

Equity in general follows rules of positive law.

(*d*) Portia need not, in a court of equity, have quibbled to save Antonio from Shylock's knife. The argument would, however, have been there scarcely so dramatic as Shakespeare has given it.

(*e*) Another instance is the doctrine of set-off, as to which see *ante*, p. 13. "

(*f*) 4 Anne, c. 16; 7 Geo. 2, c. 20.

legislature; but until the interference of that authority they were the law of the land, and, as such, observed as well by courts of equity as other courts, "*hoc quidem per quam durum est, sed ita lex scripta est*" (g).

It, in some instances, has almost disregarded positive law.

Relief against Statute of Frauds.

The law of primogeniture, as it obtains in this country, is not looked upon with favour in other countries, and in the opinion of many is not well founded in justice, yet no one would think for a moment of urging any argument as to its injustice in a court of equity. In such cases equity not only does not pretend to override law, but expressly and professedly follows the law. Nevertheless, even this must not be stated entirely without qualification. There have been a few cases where, if equity has not absolutely put an end to positive law, it has shot not much short of that mark. The most remarkable of these is the manner in which courts of equity have dealt with the Statute of Frauds. This was an enactment of the greatest benefit to society, yet it left a wide door open to the very vice of fraud which it was intended to exclude, an instance of the extreme difficulty attending all human arrangements. This door equity has boldly shut by disregarding the statute. The statute says that no action or suit shall be maintained on any agreement relating to lands, or of certain specified kinds, unless it is in writing signed by the party to be charged by it. Yet it is every day's practice to relieve in such a case, if the party seeking relief has by part performance of the contract, or in some other manner, been put into a situation which renders it against conscience for the other to insist upon the want of writing as a bar (h). Again, the

(g) Ulpian, ff. 40, 9, 12.

(h) The earliest case of the kind is *Foxcroft v. Lyster*, 2 Vern. 456; Coll. Parl. Ca. 108. Subsequent books of reports abound in cases of this kind. A very curious case, involving much discussion on the question as to the extent to which

equity would go, occurred recently. It was sought to extend the relief to the case of a verbal promise by a man to a woman whom he was about to marry, that he would leave her, by will, her own property; the marriage took place, but the promise was not fulfilled. It was held

means which courts of equity have sanctioned, of charging lands by a simple deposit of deeds relating to them, is as near to a repeal of the statute as can well be imagined (*i*). Another instance where equity has made some not inconsiderable inroad upon a rule of positive law occurs in reference to the Registration Acts (*k*). These statutes require that all incumbrances upon lands in the counties to which they relate shall, in order to be supported as against subsequent dealings, be registered. Equity has, however, modified this rule, to the extent of determining that where the person dealing subsequently has notice of the prior incumbrance, he shall give effect to it, whether registered or not (*l*).

Registration
Acts.

It is certainly a most righteous principle (*m*), that a person who has notice of the just claim of another shall not avail himself of any formal defect in the title of that other so as to oust his rights, yet, in the cases to which we now refer, to uphold this principle is almost to infringe a rule *juris positivi*.

Equity corrects the imperfections of common law whenever there are relations existing between the parties which the common law is unable to take cognizance of, and yet which materially affect their mutual rights and duties; for instance, suppose a man, knowing that he has a good title to land in the possession of another, allows him

Conscientious dealing between parties connected together by some relation of confidence is enforced, notwithstanding legal rights.

by Lord Cranworth, whose judgment was afterwards assented to by the House of Lords, that the widow could obtain no relief. *Caton v. Caton*, L. R. 1 Ch. 137; 2 H. L. 127.

(*i*) Lord Eldon appears to have thought this, and often commented on *Russell v. Russell*, 1 Bro. C. C. 269, the earliest case in which it was allowed. See *Ex parte Coming*, 9 Ves. 115.

(*k*) For Middlesex, 7 Anne, c. 20; for the West Riding of Yorkshire,

2 & 3 Anne, c. 4; 5 Anne, c. 18; and for the East Riding and Kingston-upon-Hull, 6 Anne, c. 35; and for the North Riding, 8 Geo. 2, c. 6.

(*l*) *Neve v. Le Neve*, Amb. 436; *Davis v. Strathmore*, 16 Ves. 419; *Tunstall v. Trappes*, 3 Sim. 301. As between persons who claim *in invitum*, and not by contract, such as judgment creditors, notice is immaterial. *Benham v. Keane*, 3 De G. F. & J. 318.

(*m*) See Dig. lib. 4, tit. 3.

to expend money upon it, and then ejects him; and that he then brings an action for mesne profits, here common law could not allow a set-off in the action of the money expended, yet the action would be unjust without such allowance; a court of equity would, in such a case, interfere (*n*).

Accounts
between
partners,
&c.

Complicated
accounts.

In the case of accounts between partners, a court of common law will not entertain an action by a man against his partner; to supply this omission, then, is the province of a court of equity. Similar cases arise between co-executors, and corporators. Again, actions of general account are quite admissible, yet the form of an action is very inconvenient for the investigation of complicated accounts; although, therefore, a court of equity is not the proper tribunal for a mere money demand, yet, from its power to investigate intricate facts, it has long exercised jurisdiction in cases of complicated accounts (*o*); and where there is any relation of confidence existing between the parties, such, for instance, as that of principal and agent, the case seems still more naturally to fall within the jurisdiction; but unless the accounts are mutual, and not consisting of payments and receipts on one side only, or at least very complicated, or the confidential relation is clear, the court will refuse to entertain the case (*p*).

Equity de-
termines ac-

Another inaccurate account of equity, as regards the

(*n*) *Cawdor v. Lewis*, 1 Y. & C. 427.

(*o*) The great facility for references of actions to arbitration under the Common Law Procedure Act, 1854, may perhaps now diminish the number of suits in equity founded upon complicated accounts.

(*p*) The case of *Smith v. Leveaux*, 2 De G. J. & S. 1, where the Lords Justices overruled Lord Hatherley, then V.-C. Wood, was perhaps a rather hard case, where this rule was enforced. There, the defen-

dants, a commercial firm, agreed with the plaintiff to pay a percentage of 3¼ per cent. upon all orders which might be given by persons introduced by him. The bill was for a discovery and account of these orders. It was, however, dismissed. See, for instances, *Dunwiddie v. Bailey*, 6 Ves. 136, 141; *Phillips v. Phillips*, 9 Baire, 471; and for instances concerning complication, *Tuff Vale Railway Co. v. Nicor*, 1 H. L. 111; *Foley v. Hill*, 2 H. L. 28.

rules of interpretation of laws or instruments adopted by it, is that it determines according to the spirit of the rule, and not the strictness of the letter (*q*); and no doubt this is a favourite maxim of the court, but it by no means is a canon of interpretation belonging peculiarly to this court. There is not a single rule of interpreting laws which is not equally used by all judges, as well those of courts of law as of courts of equity. The law on this subject was laid down, long ago, as follows (*r*):—"From which cases it appears that the sages of the law heretofore have construed statutes quite contrary to the letter in some appearance, and those statutes which comprehend all things in the letter they have expounded to extend but to some things, and those which generally prohibit all people from doing such an act they have interpreted to permit some people to do it, and those which comprehend every person in the letter they have adjudged to reach to some persons only, which expositions have always been founded upon the intent of the legislature, which they have collected sometimes by considering the cause and necessity of making the act, sometimes by comparing one part of the act with another, and sometimes by foreign circumstances, so that they have ever been guided by the intent of the legislature, which they have always taken according to the necessity of the matter, and according to that which is consonant to reason and good discretion."

The construction of an act of parliament, therefore, is the same in all courts; or if they differ, it is only as one judge may differ from another judge in the same court, a difference which, from the difficulty which exists in framing statutes, so as to be free from ambiguity, unhappily not unfrequently occurs. It comes oftener within the province of a court of equity, acting as it does in the administration of property, to give constructions to executory instruments, such as wills, agreements for settlement,

(*q*) Lord Kames' *Princ. of Equity*,
177.

(*r*) *Stradling v. Morgan*, Plowd.
199, 204.

and the like; and in doing this, judicial liberality in the interpretation of language is often very largely called into play, but no rule of interpretation peculiar to the court is ever contended for (*s*). For instance, suppose a deed of settlement purporting to be made in pursuance of articles does not carry into effect what a court of equity would construe as the intention of the articles, a court of law adheres to the construction of the deed, and disregards the articles (*t*); and so also would a court of equity, so long as no proceedings have been taken to reform the settlement (*u*), even though the case was such that a court of equity would, probably, in a suit instituted for the purpose, reform the settlement (*x*).

Another definition that fraud, accident, and trust are peculiar objects of equity.

Insufficiency of the definition.

It has also been said (*y*) that FRAUD, ACCIDENT, and TRUST, are the proper and peculiar objects of a court of equity. This, again, is an inaccurate view to give of the subject, because, although under these three heads fall a very large number of the cases which require the interference of a court of equity, yet they fail in being a basis of classification, for courts of law have power to deal, and do deal, with numerous cases which also involve these same elements.

Accident.

Fraud is equally cognizable, and equally adverted to, in a court of law, as in a court of equity, and therefore cannot *simpliciter* be claimed as a foundation of jurisdiction. Again, formerly there were divers strict rules of legal procedure, such as that requiring profert of an instrument constituting the foundation of an action, which were not dispensed with, even though the non-profert was explained on some reasonable ground of accident; for instance, that a deed had been lost, or was in the hands of a person who

(*s*) See remarks of L. J. Knight Bruce upon the construction of documents in *Key v. Key*, 4 De G. M. & G. 84, adhered to in *Ware v. Watson*, 7 *ib.* 259.

(*t*) *Doe d. Daniel v. Woodroffe*, 10 M. & W. 608.

(*u*) *Hammond v. Hammond*, 19 Beav. 29; *Holliday v. Overton*, 15 Beav. 480.

(*x*) *Bold v. Hutchinson*, 25 L. J. Ch. 598.

(*y*) 1 Roll. Abr. 374; 4 Inst. 84; 10 Mod. 1.

refused to produce it, and consequently it was necessary to resort to equity to obtain a relaxation of such rules. But since courts of law have so far modified their rules as to make due provision for these difficulties, it has resulted that accident rarely now forms a satisfactory reason for equitable interference: and in most cases, where the jurisdiction is allowed to exist at all, it is merely because, having been once acquired, it cannot be afterwards lost or abandoned. Of those few cases which, resting upon the ground of accident, are such that relief can still only be obtained in a court of equity, we may mention, as an example, that of a defective execution of a power. ^{If Defective execution of a power.} a man, having a power to appoint a fund, and intending to execute it, does so by will, when, perhaps, the power requires a deed, or where some other formalities in executing the power, not of the essence of the act, have not been observed, these are accidental circumstances which render the execution of the power bad at law; yet equity has always, if there was some good moral reason for supporting the execution of the power, such as to provide for payment of debts, or the support of wife or children, been ready to interfere and establish the execution of the power (z). It may here be noticed that equity has never ventured to correct a defective execution of a will, the mode of executing that particular instrument being one to which the legislature has paid especial attention; and though, through the accidental ignorance of an intending testator, he may fail to carry out his intention, this is an irremediable accident, and rightly so, for reasons sufficiently obvious.

As to trusts, the relation of trustee and beneficiary, ^{Trusts.} or *cestui que trust*, is, when a trust technically so called exists, no doubt peculiarly within the jurisdiction of a court of equity, but there are many cases substantially of trust which are cognizable in courts of law; for in-

(z) *Chapman v. Gibson*, 3 Bro. C. C. 229; *Tollet v. Tollet*, 2 P. W. 489.

stance, deposits and all manner of bailments, and especially that implied contract, so highly beneficial and useful, of having undertaken to account for money received to another's use, which is the ground of an action on the case almost as universally remedial as a bill in equity. And there are cases where courts of law take notice even of trusts, commonly so called; for instance, a court of law allows an executor or administrator to retain for a debt owing to a trustee under a trust of which the executor or administrator is the *cestui que trust* (a).

The above inaccurate definitions contain some truth.

All these descriptions of equity, then, as distinguished from law, in our system of administration of justice, are, as we see, inaccurate and incomplete; and yet, to no inconsiderable extent, they assist the mind in comprehending what portion of the whole area of justice is taken possession of by the Court of Chancery. For equity does, in each department of natural justice indicated by these descriptions, go farther, and take a wider and less restricted view than courts of law do, and so it is able to approach somewhat nearer to that complete and perfect result, the attainment of which is scarcely to be hoped by the most sanguine.

Fraud in the eye of this court may exist without moral fraud.

In a court of equity, many actions, not criminal in themselves, nor even done with a wrong intention, are scrutinised, and often disapproved of and set aside, when to impugn them in a court of law would be impossible. There have been cases, indeed, in which equity has been thought to have gone too far in attempting to enforce a scrupulous adherence to conscientious dealing, and the rules of the court have consequently been relaxed in this respect (b).

(a) *Roskelley v. Godolphin*, Raym. 483; S. C. 2 Show. 403; and *Skiner*, 214; *Marriott v. Thompson*, Willes, 186; *Loane v. Casey*, 2 W. Black. 965. See further on this subject *Thompson v. Thompson*, 9 Price, 464; *De Tastet v. Shaw*, 1

B. & A. 664.

(b) This has recently been the case as to the rule of the court, that a purchaser of a reversion bears the burden of proving that he gave full value. See 31 Vict. c. 4, which enacts, s. 1, that no pur-

When there are dealings between persons standing in a relation of confidence to one another, or so connected that one is liable to be under the influence of the other, the court most jealously watches over and controls their transactions, and readily interferes to prevent any abuse of the confidence, and prevent any undue exercise of the influence so existing. The exact limits of this jurisdiction, which has frequently and justly been said to be of the most salutary kind, have advisedly never been defined, but "it cannot be too freely applied either as to the persons between whom, or the circumstances in which, it is applied" (c). It extends to "all the variety of relations in which dominion may be exercised by one person over another" (d). It would lead us too far if we were to follow this principle into all the numerous relations to which it has been applied, for bills to set aside transactions of this character are of daily occurrence; the commonest classes of cases are those where the transactions are between parent and child (e), guardian and ward (f), solicitor and client (g), and surgeon and pa-

Dealings between persons connected by confidential relations.

chase made *bond fide*, and without fraud or unfair dealing, of any reversionary interest in real or personal estate shall be set aside merely on the ground of undervalue.

(c) *Per* Sir G. Turner, in *Billage v. Southec*, 9 Hare, 540. See, also, *Tate v. Williamson*, L. R. 2 Ch. 55; *Rhodes v. Bate*, L. R. 1 Ch. 252.

(d) *Per* Sir S. Romilly, *arguendo* in *Huguenin v. Baseley*, 14 Ves. 28; and see *Dent v. Bennett*, 4 M. & Cr. 277 (where Lord Cottenham approves of Sir S. Romilly's proposition); *Norton v. Rally*, 2 Eden, 286, where an annuity granted by a woman in a state of religious delusion to her spiritual adviser was set aside. In a very recent case of *Lyon v. Home*, L. R. 6 Eq. 655,

large gifts by a woman, impressed with the belief of spirits, to the person who represented himself as the "medium" of communication with her late husband's spirit, were set aside.

(e) *Cocking v. Pratt*, 1 Ves. 401; *Wright v. Vanderplank*, 2 K. & J. 1; *Hoghton v. Hoghton*, 15 Beav. 278. The cases of this class, which are very numerous, extend to a person who has placed himself in *loco parentis*; *Archer v. Hudson*, 7 Beav. 551; and as to elder and younger brothers, see *Sercombe v. Saunders*, 34 Beav. 382.

(f) *Hylton v. Hylton*, 2 Ves. 549; *Hatch v. Hatch*, 9 Ves. 292.

(g) *Proof v. Hines*, Ca. t. Tall. 116; and see Lord Brougham's judgment in *Hunter v. Atkins*, 3

tient (*h*): it may be added, that if the benefit be conferred upon third parties who have taken no part in the transaction, and are therefore innocent of all fraud, still they will not be allowed to retain that which comes through a polluted channel (*i*).

Notwithstanding the willingness of the court to exercise this control over the consciences of men, great caution is observed not to encroach upon the functions properly exerciseable by other courts; and a remarkable case of the refusal of the Court of Chancery to interfere is that of *Allen v. M'Pherson* (*h*), where the House of Lords, sitting as a court of appeal from the Court of Chancery, held that the court would not after probate set aside a will obtained fraudulently and by undue influence.

From what we have shown, it will be observed that equity does in no inconsiderable measure fulfil the popular notion entertained of it, that it aims at complete justice irrespective of any legal quibble or technical difficulty. Still, it must carefully be borne in mind, that the court is slow at the present day to convert any moral doctrine which has not already been made a ground of equitable jurisdiction, into a principle of equity. We pass on now to another and wholly distinct ground which has been occupied by the court, and where it has brought within the range of its influence a large field of jurisdiction.

The court from the earliest times has adopted a mode

M. & K. 135. As to the relationship of counsel and client, *ante*, p. 24.

(*h*) *Billage v. Southee*, 9 Hare, 534.

(*i*) *Bridgman v. Green*, Wilm. 58, 64; 2 Ves. 627.

(*k*) 1 H. L. Ca. 191. It will be observed that the decision was made by three lords (Lords Lyndhurst, Brougham, and Campbell) who were more particularly versed in com-

mon law, against the opinions of two others (Lords Cottenham and Langdale), who were equity judges. See the discussion in *Hunt v. Hunt*, 31 L. J. Ch. 161, where a husband was restrained from suing in the Divorce Court for restitution of conjugal rites, contrary to his covenants in a separation deed; and the very recent case, *Springhead Spinning Co. v. Riley*, L. R. 6 Eq. 551.

of giving relief, different in its nature from that which is usually given by courts of law, and this has drawn within its cognisance a vast series of cases where the suitors think that the relief in a court of law is inadequate to their wants. The relief given by the Court of Equity may be described as of a positive character, giving the specific thing which the parties are entitled to, whilst actions at law, with a few exceptions (*l*), give only the negative remedy of compensation by damages for a deprivation or violation of the true right.

Positive relief which the court gives.

Wherever possible, equity takes care that a right shall be actually enjoyed, and with this view will interfere to prevent a violation of that right (*m*). A court of law will not interfere till the violation be effected. It, for instance, will, when a breach of covenant in a lease or in a contract between landowners has been committed, give damages for the breach, but a court of equity will do more, it will anticipate the event, and restrain a person who merely shows an intention to break his covenants (*n*). Or, to take another example illustrating the beneficial result obtained by such ready interference, damages will be given in the one court if a man has been carrying on a trade in some particular locality in violation of his contract with another man not to do so. But these damages,

(*l*) Actions of ejectment, trover, *quare impedit*, and dower (retained by 3 & 4 Will. 4, c. 27) are not of the negative kind; and see *post* for a view of the remedies furnished by common law courts under their powers, as enlarged by recent legislation. There still, however, remain sufficient defects in positive relief furnished by them, to make the statements in the text true.

(*m*) See, for a strong example, *Lloyd v. London, Chatham, and Dover Railway Co.*, 2 De G. J. & S. 568, where the work constructed in violation of the right claimed was a

work of public importance.

(*n*) See *French v. Macaulay*, 2 Dru. & War. 269; *Lord Grey de Wilton v. Sacon*, 6 Ves. 106; *Tulk v. Moxhay*, 2 Ph. 774. The remedy is extended even to restrain an underlessee from committing breaches of covenants in the original lease, of which he is ignorant. *Parker v. Whyte*, 1 H. & M. 167; and even a tenant from year to year of a freehold owner, who had contracted with a previous owner that the land should not be used as a beer-shop. *Wilson v. Hart*, L. R. 2 Ch. 463.

which will be only given for past acts of trading, are, it may be, of small value as a remedy compared with the effectual relief which the other court gives by prohibiting the trade on pain of imprisonment. This positive kind of relief is clearly of great value in these cases; it will even be granted although the parties by their contract have fixed the amount of damages in respect of the breach (*o*).

The two kinds of justice which may be obtained, the one strictly remedial, the other preventive in respect of the violation of continuing rights, are clearly different in kind;—one is legal, the other equitable;—and neither of the two courts will usurp the functions of the other. If the injury complained of be completed, so that compensation alone can be awarded, the court of equity has nothing to do with the case (*p*), although the court now (*q*) can in many such cases award damages in addition to or even, according to its discretion, in substitution for the injunction; yet it will refuse to interfere altogether if a court of law could have given every remedy which the case admits of (*r*). On the other hand, courts of law,

(*o*) *Howard v. Hopkins*, 2 Atk. 371; *Roy v. Duke of Somerset*, *ib.* 190; *Chilliner v. Chilliner*, 2 Ves. S. 528; *Logan v. Wienhold*, 7 Bl. N. S. 1; *Roper v. Bartholomew*, 12 Price, 796; *Hardy v. Martin*, 1 Cox, 26; *City of London v. Pugh*, 4 Bro. C. C. 395, Toml. Ed.; *French v. Macale*, 2 Dru. & War. 269; *Barret v. Blagrove*, 5 Ves. 555; *Fox v. Scard*, 33 Beav. 327; *Howard v. Woodward*, 34 L. J. Ch. 47; *Long v. Bowring*, 33 Beav. 585; *Coles v. Sims*, 5 De G. M. & G. 1; from which cases it will be seen that the fact of a penalty, or even liquidated damages, being fixed by the parties, is not regarded by the court, if the real intention was that

the agreement should be observed. If, however, it appears that the observance of the agreement and the payment for the breach were equally within the intention, then the court will not interfere. See *Woodward v. Gyles*, 2 Vern. 119; *Rolfe v. Peterson*, 2 Bro. P. C. 436, Toml. Ed.; *Ponsonby v. Adams*, *ib.* 431.

(*p*) See cases cited in preceding note, and *Saniter v. Ferguson*, 1 M. & G. 286.

(*q*) Under the recent act, 21 & 22 Vict. c. 27, see as to this act in connection with specific performance, *post*, p. 68, note (*c*).

(*r*) *Durcell v. Pritchard*, L. R. 2 Ch. 244.

though able now under certain circumstances to issue a writ of injunction, will not entertain any application when no breach has been committed.

Another branch of the same kind of positive relief is the power which the court exercises of compelling the specific performance of agreements. A man may be indirectly compelled to carry out his contract by the fear of being mulcted in damages by a court of law, in the event of his failing to do so; but another, and often a desirable mode, is to insist upon his performing the duty which he owes under the contract by putting him in prison till he does so; or, as may happen in some cases, to do it for him, of course at his cost. The latter are the courses which the Court of Chancery adopts. If a man agrees to sell land, he will be at the proper stage of a suit in equity, instituted for the purpose, ordered to execute a conveyance, and if he disobeys he will be imprisoned for contempt: or the court will make an order vesting the land having the same effect as if he had executed it (*s*). By virtue then of the peculiar reliefs which this court is able to give, and which other courts cannot give, the specific performance of contracts forms an important branch of equitable jurisdiction. But it is not every contract that will draw with it an equity to compel its fulfilment. Some contracts are obviously entered into solely for the purpose of making a profit; of this kind are the ordinary commercial contracts for the purchase or sale of goods such as are constantly in the market: in the case of these contracts, if they be broken, damages are all that are or can be required; with these, therefore, equity has nothing to do. Other contracts are of a peculiar nature, involving personal conduct or some similar ingredient, such as to sing at a theatre (*t*), or write

(*s*) Under the Trustee Act, 1850, M. & G. 604; *Kemble v. Kean*, 6
see s. 30. Sim. 333.

(*t*) *Lumley v. Wagner*, 1 De G.

a book (*u*), or keep an inn (*x*), or even build a house (*y*). It is considered to be beyond the power of any court to secure the due performance of such acts by any amount of compulsion (*z*), and so equity will not decree their performance; nevertheless, in many of even these cases, equity will, indirectly, do much towards securing the due completion of the agreement; for if the contract contain a negative clause correlative to the positive agreement, such as not to sing at any other theatre, or not to write plays for any other theatre, equity will interfere by restraining a violation of the negative clause (*a*). This interference will be granted, however, only on condition that the plaintiff who seeks the aid of the court is not himself under any obligation to do any acts of that nature which the court cannot specifically enforce. This is an obviously reasonable condition, for it would be contrary to all the practice of the court to give equitable relief to one over whom the court has not complete control in respect of his correlative duties (*b*).

What we have said shows the general character of contracts which may form the subject of a chancery suit; many nice distinctions have been taken upon the subject (*c*), but into these we cannot here enter. The contracts

(*u*) *Clarke v. Price*, 2 Wils. 157; and see *Morris v. Colman*, 18 Ves. 437.

(*x*) *Hooper v. Brodrick*, 11 Sim. 47.

(*y*) *Brace v. Wehnert*, 25 Beav. 348; *Taylor v. Portington*, 7 De G. M. & G. 328; *Lytton v. Great Northern Railway*, 2 K. & J. 395.

(*z*) For other cases where the question has arisen, see *Kimberley v. Jennings*, 6 Sim. 340 (hiring and service); *Hills v. Croll*, 2 Ph. 60 (purchase of acids); *Diétrichsen v. Cabburn*, 2 Ph. 52 (purchase of patent medicines); *Stocker v. Wedderburn*, 3 K. & J. 393 (promotion

of a company); *Ogden v. Possick*, 32 L. J. Ch. 73 (employment as agent); *Blackett v. Bates*, L. R. 1 Ch. 117 (supply of engine power); *Gervais v. Edwards*, 2 Dr. & War. 80; *Peto v. The Brighton, &c. Railway Co.*, 1 H. & M. 468.

(*a*) *Lumley v. Wagner*, 1 De G. M. & G. 604; *Morris v. Colman*, 18 Ves. 437. See, also, *Diétrichsen v. Cabburn*, 2 Ph. 52. The question involves many difficulties; see *Brett v. East India, &c. Shipping Co.*, 2 H. & M. 404.

(*b*) See cases in preceding notes.

(*c*) See *Onions v. Cohen*, 2 H. & M. 354; *Blackett v. Bates*, 35 L. J.

we have mentioned for the sale or purchase of an interest in land, and also of many kinds of personal property, such as shares in a company (*d*), are instances which are daily before the court. We will only add that where the main provisions of the contract have been of a description such as the court commonly deals with, but some minor accessory term is of a personal nature, the court has in a few instances ordered specific performance of that which can be so decreed, and directed a covenant to be entered into for the rest (*e*).

There are many other instances of this kind of relief by which the court substantially enforces the due observance of rights, by restraining the commission of acts in violation of them, besides cases of contract. Thus, the court will restrain the infringement of a patent of invention (*f*), the counterfeiting of a trade mark (*g*), and the piracy of a copyright (*h*).

Ch. 324; *Kay v. Johnson*, 2 H. & M. 118. The act before referred to (21 & 22 Vict. c. 27), which gives the court power to assess damages, extends to cases of specific performance, and therefore has no inconsiderable bearing upon the course of the court. See *Soames v. Edge*, John. 669; *Norris v. Jackson*, 1 J. & H. 399. The act does not extend the jurisdiction to cases not previously within it. *Wicks v. Hunt*, John. 380; *Ferguson v. Wilson*, L. R. 2 Ch. 17.

(*d*) *Paine v. Hutchinson*, L. R. 3 Ch. 388; *Evans v. Wood*, L. R. 5 Eq. 9. The court will not enforce specifically agreements for the sale of ordinary stock, which can any day be purchased at the market price. *Cuddee v. Rutter*, 5 Vin. Abr. 538, pl. 21. See notes to this case in 1 White & Tudor's L. C. 640.

(*e*) See *Wilson v. West Hartlepool*

Railway, 2 De G. J. & S. 475; *Onions v. Cohen*, 2 H. & M. 354.

(*f*) Suits of this kind are of daily occurrence, and scarce a volume of modern reports could be found not containing many.

(*g*) In *Blanchard v. Hill*, 2 Atk. 484, Lord Hardwick deprecated the interference of courts of equity in these cases: nevertheless it is now well established. *Croft v. Day*, 7 Beav. 84; *Hall v. Barrows*, 33 L. J. Ch. 204; *Leather Cloth Co. v. American Leather Cloth Co.*, 11 H. L. 523; *M'Andrew v. Bassett*, 33 L. J. Ch. 561; see also *Maxwell v. Hogg*, L. R. 2 Ch. 307. The ground upon which the court has proceeded in these cases of trade marks has been much in dispute, but it seems to be founded upon a right in the nature of property. See *Leather Cloth Co. v. American Leather Cloth Co.*

(*h*) *Walcott v. Walker*, 7 Ves. 1;

Restraint of
action at
law on
equitable
grounds.

We have already adverted to the power which the court has assumed of preventing persons from proceeding at law contrary to equity and good conscience: this is done by injunction. The court has always declined laying down precise rules as to the limits within which it will keep in exercising the power of granting injunctions, but such limits may now usually be determined with sufficient accuracy by reference to precedents, a very vast number of which are contained in the reports (*i*).

Another species of suit, the reason for which very much arises from the power of giving peculiar relief possessed by the court is, where the court, at the instance of the plaintiff, sets aside a completed transaction. If there be good grounds for treating a conveyance of property or other deed or instrument as an improper transaction, and for setting it aside, a court of equity alone has the power to accomplish that result in a direct manner. A court of law is either powerless to deal with the case at all, or at the most possesses inadequate powers. The grounds for setting aside a completed transaction, which usually are some species of fraud, may be pleaded in a court of law; but a plea can only arise as a defence to an action of some kind, and no procedure at law is applicable for commencing proceedings to avoid the effect of a deed upon the ground of fraud. But a bill may be filed praying that a deed of conveyance or other instrument obtained in some improper manner may be set aside, and the rights of parties restored to the state in which they would have been had such deed or other instrument never been executed (*k*). The general

Kelly v. Morris, L. R. 1 Eq. 697, where the defendant was restrained from copying directly, although *ex necessitate rei* another work on the same subject, if correct, must give identical information, and see *Scott v. Stamford*, L. R. 3 Eq. 718; and as to publication of private letters, *Gee v. Pritchard*, 2 Sw. 402.

(*i*) For an early statement of the doctrines adopted by the court, see Lord Ellesmere's judgment in the *Earl of Oxford's Case*, 1 Ch. Rep. 1; and see the cases cited in the notes to that case in White and Tudor's Leading Cases in Equity.

(*k*) Where a vendor conveys, the price not being paid, he retains a

doctrines of equity, of course, govern the decision in such suits.

Until recently, there was a numerous class of suits ^{Interpleader.} called interpleader suits, or suits for relief from adverse claims. Where a man in the possession of certain goods or money not his own finds himself exposed to the adverse claims of several persons, it often happens that he cannot safely take a discharge from any of them, since it is doubtful which of them is properly entitled to claim. In such cases the court gives relief by requiring the several claimants, when brought before it in a suit instituted for the purpose, to interplead, that is, bring their claims to an issue, so as to be decided upon. Formerly, this remedy in equity was alone available for the purpose, but since similar remedies have been given to courts of law (*l*), interpleader suits are less common, being usually confined to cases where the claims are of an equitable nature.

We have seen (*m*) that the Court of Chancery had, as ^{Partition.} part of its common law jurisdiction, cognisance of a writ of partition in certain cases; and in other cases the old writ of partition issued out of chancery, but was returnable at common law; this writ was originally only applicable to the case of coparceners; it was, in the reign of Hen. VIII., extended to all cases of joint tenancy and tenancy in common, and continued to be occasionally used until abolished by the statute 3 & 4 Will. 4, c. 27, s. 36; but there were many inconveniences attending it, from the inability of courts of law to compel discovery, and to make compensation for inequality in the division of property, which obviously would often be necessary. These reasons led to the adoption of a concurrent jurisdiction by courts of equity, the practical convenience of which led to the disuse and abolition of the writ.

lien on the land enforceable in this court against the vendee and persons claiming as volunteers, even though the deed contains a receipt for the money. *Mackreth v. Symmions*, 15

Ves. 329; S. C. 1 Wh. & Tudor, 235.

(*l*) 1 & 2 Will. 4, c. 58; 1 & 2 Vict. c. 45; 7 & 8 Vict. c. 96; 9 & 10 Vict. c. 95.

(*m*) *Ante*, p. 33.

The method of procedure adopted by the Court of Chancery is by issue of a commission to make the partition and adjust the rights of the parties by giving compensation, or owelty, as it is called, where the divided portions of the land cannot be accurately made proportionate to the shares of the several owners; liberty is, however, usually given to the parties themselves to make proposals for the partition, and the court gives its consideration to these. Recently, the benefit of this action on the part of the court has been extended by giving the court power to direct a sale of the property in certain cases instead of a partition, which obviously would often be very advantageous, but previously could not be done without the consent of all concerned, a thing often, through infancy or other disabilities, not to be obtained (*n*).

Bills of
peace.

In some cases, in which a perfect and appropriate remedy exists at law, but the circumstances are such as to give rise to innumerable actions at law, founded upon the same general private right, each of which actions must be separately tried and disposed of, whether such right is a right claimed in favour or against a number of persons, equity will interfere, in order to avoid multiplicity of suits, or to prevent oppressive litigation. Thus, where the amount of a general fine, payable by all the copyhold tenants of a manor, is in dispute (*o*), or where the rights of common to which the tenants are entitled are not ascertained (*p*), equity will entertain a suit on behalf of all the copyhold tenants. Another instance of such interference is where the court will restrain a man from continuing to invade a legal right by a series of separate acts, each of which gives rise to an action, but the damages in each case are trivial; thus equity will restrain the infringement of an ancient ferry (*q*). As an instance of the interference of

(*n*) See 31 & 32 Vict. c. 40.

(*o*) Story, Eq. Jur. § 856.

(*p*) *Phillips v. Hudson*, 1 L. R. 2 Ch. 243.

(*q*) See Vin. Abr. tit. Nuisance, G. 4; *Huzzey v. Field*, 2 C. M. & R.

432; *Att-Gen. v. Richards*, 2 Anst.

616; *Cory v. Yarmouth, &c. Rail-*

way Co., 3 Hare, 593. Compare also

Att-Gen. v. Sheffield Gas. Co., 3 D.

M. & C. 304.

the court to prevent oppressive litigation, we may mention a recent case where the reservoir of a waterworks company burst, thereby causing damage to a very large number of people; a large number of claims was made against the company, all founded upon similar grounds. The company instituted a suit against some of them, for the purpose of determining, once for all, a question which had arisen, upon which turned the validity of the claims. The court entertained the bill as of the nature of a bill of peace, though, perhaps, not strictly so, since the claims were not absolutely identical (*r*).

The last head of jurisdiction, founded upon the character of the relief which the court gives, which we will mention, is the perpetuation of testimony. Courts of common law only permit the examination of witnesses when an action is at issue, and the evidence must be confined to the issue in such action. It sometimes happens that there is a reasonable certainty of litigation at a future time, yet, from the circumstances of the case, the right to be claimed or defended in such litigation cannot, or does not, form the subject of present proceedings. To take a single instance, a person may be in possession of an estate under a title depending upon a marriage, the validity of which he may have reasonable cause to fear will be disputed, and to support which, if litigation should ensue, the evidence of certain witnesses would be necessary. Now, clearly he, being in possession, can take no proceedings against a possible claimant who does not come forward; if, therefore, he had no means of preserving the evidence in question, there might result a failure of justice, because the other might await the deaths of the witnesses, and then press his claim. It is easy to suggest numerous similar instances. For all these the Court of Chancery has provided a remedy by allowing a bill to be filed to perpetuate the testimony (*s*).

Perpetuation of testimony.

(*r*) *Sheffield Waterworks v. Yeomans*, L. R. 2 Ch. 8.

(*s*) See Consolidated Orders, ix. r. 6.

theless, it takes every care that this right shall not be abused, as it is obviously not unattended with danger, because witnesses, whose evidence is not to be published until a period which may be subsequent to their decease (*t*), are, under some temptation, to give interested evidence. If, therefore, by any means the issue can be tried at once, such a suit will not be allowed (*u*). When the evidence has been taken, it is sealed up until the time comes to use it, and the suit is at an end, for, of course, it never comes to a hearing, and the plaintiff pays the costs.

A modern act (*v*) has extended the benefit of this proceeding to a case not previously admitted by the court, viz., where a person would, under the circumstances which he alleges to exist, become entitled, upon the happening of some future event, to any honour, title, dignity, or office, or any estate or interest in any property, the title to which cannot be brought to trial before the happening of the event in question. It enables him to file a bill in chancery to perpetuate any testimony which may be material to support his claim. In any such suit, if the crown is interested, the attorney-general is to be made a party in respect of such interest, and in any proceedings in which the evidence taken in the suit is used, no objection shall be taken that the crown was not a party to the suit.

We have hitherto been exhibiting that part of the jurisdiction of the court which, having for its origin the ancient assumptions of power on the part of the early chancellors, although modified or enlarged by subsequent legislation, may be described as its inherent jurisdiction, depending as we see partly upon doctrines of equity, and partly upon the nature of the relief. We have

(*t*) If the witnesses are alive, and in this country, when the issue is actually raised, the evidence taken in the suit is not allowed to be read.

(*u*) *Lord North v. Gray*, 1 Dick. 14; *Parry v. Rogers*, 1 Ven. 441;

Pawlett v. Ingrey, 1 Ves. 308; see the recent case of *Ellice v. Roupell*, 32 Beav. 299, 308, 318, where the practice upon these bills was very much discussed.

(*v*) 5 & 6 Vict. c. 69; and 10 Cl. & Fin. 305.

sufficiently illustrated the various points which the subject presents to enable the reader to form a correct notion of the court's action, and its general extent and character. Those who would trace with greater precision the boundary of the field, must consult more extensive treatises than the present can be. It remains now to mention briefly the particular duties cast upon the court by the legislature, which, though allied in their nature to some of the ordinary proceedings of a court of equity, depend entirely upon their statutory origin for their present existence, so that the powers of the court are limited and defined by the statutes which created them. Statutory jurisdiction of the court.

Of these duties and powers, the most prominent at the present day are those which the Court of Chancery exercises in winding up public companies. The great extension of commercial enterprise in recent times, as developed through the medium of incorporated associations, consisting of numerous individuals, but acting as a single indivisible unit, is unhappily attended by dangers not differing in their nature from those which threaten smaller associations of two or three members constituting a private partnership. The legislature has, it is almost needless in the present day to remark, determined (working according to its habit by tentative measures, set forth in successive acts,) the laws which regulate the formation, the continuance, and, what is more to our present purpose, the dissolution of these associations. Under these acts the Court of Chancery has been constituted the tribunal to take charge of the administrative business which the dissolution of a company and the winding up of its affairs involve, whenever that administration requires the intervention of a court of justice (*x*). Under the principal Companies.

(*x*) See sect. 81 of the Companies Act, 1862 (25 & 26 Vict. c. 89); it will be observed that for a mining company within the jurisdiction of the court of the Stannaries, that

court has also cognisance, but not exclusive cognisance. *In re Penhale and Lomax, &c. Co.*, L. R. 2 Ch. 398.

act now in force (The Companies' Act, 1862, 25 & 26 Vict. c. 89), the court entertains in a summary way applications, by petition, to wind up companies, and the collection and distribution of the assets are made under the direction of the court (*y*). Other duties in connection with the affairs of companies, not being wound up, are also cast upon the court. By the same act, the court has power to rectify the register of members, if the name of any person is without sufficient cause entered in or omitted from the register (*z*). Also under the later act of 1867 (30 & 31 Vict. c. 131), the court has other duties to perform relative to schemes for reducing the capital of companies. To these we need not refer in detail.

Somewhat analogous to the duties of the court relative to companies generally, are some special provisions made by the legislature for railway companies. Under certain circumstances, schemes for the arrangement of the affairs of these companies, when they are in financial difficulties, may be proposed to the court (*a*).

Another most important power conferred by the legislature upon the court, is that which it exercises in favour of creditors, for the purpose of enabling them to obtain satisfaction of their debts by sale of the lands of their debtor.

Payment of
debts by
sale of land.

We have elsewhere shown how lands were by slow degrees made available as assets for the payment of debts; and we here only point out, that it is by the aid of this court, that the creditor is able to proceed to the complete remedy, by sale of the lands, which the law allows.

(*y*) The rules for winding up were issued 11 Dec. 1862.

(*z*) S. 35. There is some conflict of judicial opinion as to the extent of the jurisdiction under this section; see *Ex parte Swan*, 7 C. B. 400; *Stewart's Case*, L. R. 1 Ch. 584; *Ward and Henry's Case*, L. R. 2 Ch. 231; *Ex parte Parker*, *ib*.

690; *Head and White's Case*, L. R. 3 Eq. 84.

(*a*) See 30 & 31 Vict. c. 127. The rules and orders upon which act were issued 24 Jan. 1868. As to what the scheme must provide for, and the powers of the court under the act, see *Re Cambrian Railways*, L. R. 3 Ch. 278.

This, in the case of a deceased debtor, was given by the act 3 & 4 Will. 4, c. 104. In the case of a living debtor, there were no means of applying the lands themselves to the purpose of paying debts by a sale of them until the year 1838, when the act 1 & 2 Vict. c. 110, was passed, and then, and for a long period afterwards, the process remained tedious and costly; but now a creditor who has obtained judgment, and taken the lands in execution under a writ of elegit, may obtain an order for their sale in a simple and speedy manner by petition to the court (*b*). Upon hearing the petition, the court directs inquiries to be made as to the debtor's interest in the land and his title thereto, and as far as possible conducts the sale in the same way as in the other case, where the lands of a deceased person are sold for the payment of his debts (*c*).

Inasmuch as cases of trust and those relating to infancy Trusts and
infancy. are naturally the subjects of the care of the Court of Chancery, any improvements of the law, or facilities for the satisfaction of the wants of society which the legislature might devise, would of course take effect by the agency of the Court of Chancery; accordingly we find that several acts have been passed for the purpose of meeting the specific wants of trustees and infants. By the Trustee Relief Act (12 & 13 Vict. c. 74), trustees may in suitable cases discharge themselves from all responsibility by paying the trust moneys into the Court of Chancery, after which, the court takes upon itself the custody and distribution of the funds exactly as if a suit had been regularly commenced for the purpose (*d*). It may be noticed that this act does not, perhaps, extend the jurisdiction of the court, so much as provide peculiar and abnormal modes of approaching the court. The like may be said of several other modern enactments. The

(*b*) 27 & 28 Vict. c. 112; *Guest v. Finch*, 4 Giff. 515.
v. Cowbridge R. Co., L. R. 6 Eq. 619. (*d*) *Re Bloye's Trusts*, 1 M. & G. 488; S. C. sub nom. *Lewis v. Hilman*, 3 H. L. Ca. 607.
 (*c*) See ss. 4 and 5, and *Thornton*

Trustee Act, 1850 (13 & 14 Vict. c. 60), provides for the appointment of new trustees of a settlement or will, in a summary and expeditious way, without instituting a suit for the general administration of the trust: and a later act (22 & 23 Vict. c. 35, s. 30) allows trustees to ask for and obtain the advice of the court upon matters relating to their trust, without the formalities of a suit.

But the legislature has done more than provide short and inexpensive modes of obtaining the benefits of the court's guidance in those matters relating to administration of property, for it has in several instances given power to the court to do more than it formerly could; it can now actually change the legal right to land or estate, if a trustee refuse to act, or be unknown, or not to be found (*e*).

Closely connected with these statutory provisions facilitating the discharge of their duties by trustees, are those which relate to the custody and management of infants and their property. Infants are, as we have before shown (*f*), peculiarly the care of the court of chancery, representing the sovereign in his character of *paterfamilias*. The benefit derived from this care has not been without its share of legislative attention, and accordingly special and enlarged powers have been given to the court.

By the Custody of Infants' Act (2 & 3 Vict. c. 54), a mother of an infant who is in the sole custody or control of the father or his agent, or of any guardian after the father's death, may obtain an order from the court allowing her access to the infant at reasonable times; or, if the infant be within the age of seven years, the court may order the delivery of the infant into her custody until attaining that age.

Again, under an act passed in the year 1855 (18 & 19 Vict. c. 43, commonly called the Infants' Settlement Act), the court may give its sanction to a settlement by an

(*e*) 13 & 14 Vict. c. 60, ss. 34, 35, 45, 49. (*f*) *Ante*, p. 29.

infant of his or her property in contemplation of marriage; and it provides that a settlement made with this sanction, shall be as valid and effectual as if the person executing the settlement were of the full age of twenty-one years. The act is limited, however, in its application to infants who, if males, are of the age of twenty years, and if females, of the age of seventeen years or upwards (*g*).

In the following year, 1856, another act was passed (19 & 20 Vict. c. 120), which enables the court to authorise leases or sales of any settled estates (*h*), which the court may in its discretion deem proper to be carried out. This act extended the powers which had been conferred by the legislature upon the court, about twenty-six years previously (by 1 Will. 4, c. 65), enabling the court to authorise leases to be granted of lands of which an infant might be seised in fee or in tail (*i*).

The object of these acts was to allow advantage to be taken of the discovery of mineral wealth, the improvement of the value of property by the extension of towns and other causes, to obtain which advantage it had previously been common, in the case of large estates, to apply to parliament for private acts; a proceeding through its costliness inapplicable to small holdings.

By another act (25 & 26 Vict. c. 108) trustees having by the terms of their trust powers to dispose of land by sale, exchange, partition, or enfranchisement, may, with the sanction of the Court of Chancery, deal specially with the minerals (*k*).

(*g*) Section 4.

(*h*) The settlement is, by section 1, confined to cases where lands are limited for persons in succession. See as to these words, *Re Burdin's Will*, 7 W. R. 711. The act 21 & 22 Vict. c. 77, extends the operation to reversions and to copyholds, and the act is amended by 27 & 28 Vict. c. 45.

(*i*) See *In re Clarke*, L. R. 1 Ch. 292.

(*k*) This act was passed in a great measure in consequence of the decision in *Buckley v. Howell*, 29 Beav. 546. It will be noticed that several of the acts mentioned in the text confer powers upon trustees and others occupying a fiduciary character, which would be

The legislature has ever been anxious to promote the improvement of property, and has passed several acts with that object; to these we only refer here in order to remark, that whenever the consent or act of an owner of land, or of some interest in land, is necessary, and could not by reason of his infancy or incapacity be otherwise obtained, the court of chancery is empowered, in a proper case, to authorise the act, or give the consent on behalf of such infant or incapacitated person. The authority or consent is obtained upon a simple application by petition (*l*).

So where land in settlement, or belonging to persons under some incapacity to deal with their interest, is compulsorily taken for, or injuriously affected by, some work of public importance, such as a railway, canal, or public building (*m*), the special authority to take or injure which is, of course, derived from the legislature, it is always entrusted to the court of chancery to see that the money paid as purchase-money or by way of compensation, is applied in accordance with the rights of parties to the land taken or affected (*n*).

given to them by the settlement or will creating the trust, if prepared by a skilled draftsman having such a knowledge of the nature of the property as might lead him to anticipate its probable requirements. This knowledge, however, is rarely possessed. The writer was acquainted with an eminent conveyancer who, in preparing his own will, purposely abstained from inserting a power to grant mining leases, because he thought it was well ascertained that there were no minerals under his land. Yet not three months elapsed after his death before a coal master offered to take a lease of some coal under the land; and the trustees were compelled to go to the court for power to grant it. In connection with this remedy

by act of parliament for imperfect conveyancing, we may here call attention to the act 23 & 24 Vict. c. 145.

(*l*) See the Improvement of Land Act, 1864 (27 & 28 Vict. c. 114), amending and consolidating the law relating to the improvement of lands by owners of limited interest.

(*m*) *E. g.* The land forming the site of the new law courts now in contemplation, or land taken for purposes of, or affected by fortification, under the Defence Act, 1860 (23 & 24 Vict. c. 160).

(*n*) The general act which contains the provisions under which this is done is the Lands Clauses Act, 1845 (8 Vict. c. 18).

Charities are, as has already appeared, within the scope of that protection afforded by the court of chancery to persons under disability as to the management of their affairs, and suits in which the attorney-general, as representing the sovereign, is the plaintiff (usually instituted at the relation or instigation of some private individual interested in the welfare of the charity), are common. But besides the jurisdiction of the court to investigate and control the affairs of a charity upon the institution of a suit, the legislature has provided more speedy and inexpensive modes of correcting abuses. By the act, usually called sir Samuel Romilly's Act (52 Geo. 3, c. 101), an application may be made, by the attorney-general acting *ex officio*, or by any two or more persons interested in the charity, with the consent of the attorney-general, to the court, praying for such relief as the nature of the case may require (o).

This summary jurisdiction of the court over charities has been much enlarged by the Charitable Trust Acts, 1853, 1855, and 1860 (p), which have made provision for most cases which experience has pointed out to require some more effectual or less costly remedy than previously existed. The details of these enactments would be out of place here.

The last of the special powers which have been conferred by act of parliament upon the court of chancery which we need notice, is the control which, by the Attornies' and Solicitors' Act (23 & 24 Vict. c. 127, amending some previous acts), the court exercises over solicitors.

(o) The operation of this act has been extended by judicial interpretation of a rather liberal nature to cases which would hardly appear at first sight to be within its scope; for instance, the authorising the sale of charity lands. See *Re Parkes' Charity*, 12 Sim. 329; *Re Overseers of Eccleshall*, 16 Beav. 297; *Re*

Ashton Charity, 22 Beav. 288. The act was passed in consequence of the former act, 43 Eliz. c. 4 (commonly called the Statute of Charitable Uses) having become obsolete and fallen into disuse.

(p) 16 & 17 Vict. c. 137; 18 & 19 Vict. c. 124; 23 & 24 Vict. c. 136.

Solicitors have always been, and are, considered as officers of the court, and therefore have always been subject to its authority in matters relating to their professional duty; but by the act just mentioned, peculiar facilities are given both to the client, for the purpose of ascertaining that he has been fairly dealt with by his professional adviser, and to the solicitor for obtaining payment of his costs.

We have thus illustrated, so far as our limits would allow, the subject of this chapter; but there remains one subject which, though not strictly a part of equitable jurisdiction, is so closely allied to it, that it may, with advantage, find its place at the close of a description of the power of the court.

Idiots and lunatics not as such within the jurisdiction of the court of chancery.

In the same category, of those who, like infants, require a *quasi* parental care, are persons who, being either idiots (*q*) or of unsound mind, are unable to take care of themselves or their property. We have already remarked that the sovereign, to whose care these fall, entrusts the charge to the chancellor. But the care of idiots and lunatics does not form part of the general jurisdiction of the court of chancery. The master of the rolls and the vice-chancellors have no jurisdiction whatever to interfere with the affairs of a lunatic, which would not be the case if such interference were considered to be part of the inherent jurisdiction of the court, because in that case all applications would be heard in the first instance by one of them. It is convenient, however, in this place, to mention the law relating to lunacy, because, the care of lunatics being part of the lord chancellor's duties (*r*), which duties are shared by the other judges of the court of appeal in chancery (*s*), it is closely allied in its operation, as well as

The care of them is part of the duties of the lord chancellor.

(*q*) An idiot is one who from his birth has shown no signs of reason. It is rarely that any one is legally proved to be an idiot, but rather the conclusion arrived at is that he is a lunatic, or of unsound mind,

though not from birth.

(*r*) See *ante*, p. 29.

(*s*) The Lords Justices, under a recent act (30 & 31 Vict. c. 87, s. 13) exercise these powers when sitting separately.

its nature, with much of the common jurisdiction of the court. Moreover, the court, in the exercise of its general jurisdiction, has, where a small property under its care belonged to a person who appeared to be incapable of taking care of himself, directed that the income should be applied for his maintenance (*t*).

The custody of an idiot and of his lands was formerly vested in the lord of the fee (*u*) (and therefore still, by special custom, in some manors the lord shall have the ordering of idiot and lunatic copyholders (*x*)); but, by reason of the manifold abuses of this power by subjects, it was at last provided by common consent, that it should be given to the king, as the general conservator of his people; in order to prevent the idiot from wasting his estate; and reducing himself and his heirs to poverty and distress (*y*). This fiscal prerogative of the king is declared in parliament by statute 17 Edw. 2, c. 9, which directs (in affirmance of the common law (*z*)) that the king shall have ward of the lands of natural fools, taking the profits without waste or destruction, and shall find them necessities; and after the death of such idiots he shall render the estate to the heirs: in order to prevent such idiots from aliening their lands, and their heirs from being disinherited.

By the old common law there was a writ *de idiota inquirendo*, to inquire whether a man be an idiot or not (*a*): which must be tried by a jury of twelve men: and, if they find him *purus idiota*, the profits of his lands and the custody of his person may be granted by the king to some subject, who has interest enough to obtain them. This appropriation of property to the use of the crown was long ago considered as a hardship upon private families:

(*t*) See Shelford on Lunacy, 214, 2nd edit.

(*u*) Flet. l. 1, c. 11, § 10.

(*x*) Dyer, 302; Hutt. 17; Noy. 27.

(*y*) F. N. B. 232.

(*z*) 4 Rep. 126. Memorand. Scacc. 20 Edw. I. (prefixed to Maynard's Yearbook of Edw. II.) fol. 20, 24.

(*a*) F. N. B. 232.

and as early as in the 8 Jac. 1, it was under the consideration of parliament, to vest this custody in the relations of the party, and to settle an equivalent on the crown in lieu of it; it being then proposed that this and the slavery of the feudal tenures, which has since been abolished, should share the same fate (*b*). Yet few instances can be given of the oppressive exertion of it, since it seldom happened that a jury found a man an idiot *a natiuitate* but only *non compos mentis* from some particular time; which formerly had an operation very different in point of law.

A man is not an idiot (*c*), if he has any glimmering of reason, so that he can tell his parents, his age, or the like common matters. But a man who is born deaf, dumb, and blind, is looked upon by the law in the same state with an idiot (*d*); he being supposed incapable of any understanding, as wanting all those senses which furnish the human mind with ideas (*e*).

A lunatic, or *non compos mentis*, is one who has had understanding, but by disease, grief, or other accident, has lost the use of his reason (*f*). A lunatic is indeed properly one that has had lucid intervals: sometimes enjoying his senses, and sometimes not, and that frequently depending upon the changes of the moon. But under the general name of *non compos mentis* (which sir Edward Coke says is the most legal name) are comprised not only lunatics, but persons under frenzies, or who lose their intellects by disease; those that *grow* deaf, dumb, and blind, not being *born* so; or such, in short, as

(*b*) 4 Inst. 203; Com. Journ. 1610.

(*c*) F. N. B. 233.

(*d*) Co. Litt. 42; Fleta, l. 6, c. 40.

(*e*) In *Yong v. Sant*, Dyer, 56a, it was held that one who had become deaf, dumb, and blind by accident, not having been born so, was to be deemed *non compos men-*

tis. The presumption that a person deaf, dumb, and blind from his nativity is an idiot, is only a legal presumption, and is therefore open to be rebutted by evidence of capacity. (Chitty's Med. Jur. i. 301, 345).

(*f*) *Idiota a casu et infirmitate*. Mem. Scacch. 20 Edw. I. (in Maynard's Yearbook of Edw. II.) 20.

are proved to be incapable of conducting their own affairs. To these also, as well as idiots, the king has always been guardian, but to a very different purpose. For the law always imagined that these accidental misfortunes might be removed; and therefore only constituted the crown a trustee for the unfortunate persons, to protect their property, and to account to them for all profits received, if they recover, or after their decease to their representatives. And therefore it was declared by the statute 17 Edw. 2, c. 10, that the king should provide for the custody and sustentation of lunatics, and preserve their lands and the profits of them for their use, when they came to their right mind; and the king should take nothing to his own use; and if the parties died in such estate, the residue should be distributed for their souls by the advice of the ordinary: of course now (by the subsequent amendments of the law of administration) the residue goes to their executors or administrators.

Formerly, also, there was a writ *de lunatico inquirendo*, upon which persons were ascertained to be lunatics, which was tried much like the writ *de idiota inquirendo*. These writs are now superseded by the modern methods which have been introduced and improved as experience has pointed out the most convenient and beneficial measures to be adopted. At the present time the whole care of lunatics is regulated by acts of parliament (*g*), both as to those who are so found, after solemn inquiry or inquisition, and those who, though of unsound mind, have not been so found by inquisition, either by reason of the expectation of their recovery entertained by their friends, or from their not being possessed of any property. Both private madhouses and public asylums erected for the various

(*g*) See the following acts:—8 & 9 Vict. cc. 100, 126 (which repealed a number of earlier acts), amended by 16 & 17 Vict. cc. 96, 97; 25 & 26 Vict. c. 111; 26 & 27 Vict. c.

110; and 28 & 29 Vict. c. 80. In these acts the word "lunatic" includes "every insane person and every person being an idiot or lunatic or of unsound mind."

counties are now visited and inspected by, and subject to, the control of public officers appointed for that purpose (*h*).

When it is necessary to prove a person a lunatic, so that a proper legal control may be exercised over both his person and property, application is made to the lord chancellor, and if allowed by him (or the lords justices of the court of appeal), the inquiry is conducted by certain officers called the masters in lunacy, either with or without the assistance of a jury, according as the lord chancellor may deem fit. As soon as the lunacy has been established, a committee of the person, and another of the estate, are appointed by his lordship, and a scheme is prepared for the management of the person and estate; this, when sanctioned by the judge, regulates the maintenance of the lunatic and the management of his estate. Every change that may be requisite afterwards is only made under an order of the same high authority (*i*).

(*h*) See the acts cited in preceding note. regulating the inquiries and all the other proceedings; and the Amendment Act, 25 & 26 Viet. c. 86.

(*i*) See the Lunacy Regulation Act, 1853 (16 & 17 Viet. c. 70),

CHAPTER VI.

A SUIT IN CHANCERY.

WE will endeavour, in this chapter, to exhibit to the reader a general view of the proceedings in a chancery suit, so as to enable one who is not familiar with the course of the court to understand the principal events which take place, their effects, and relative importance; but it will not be possible, within the limits to which we are confined, to give much account of the numerous rules which require to be observed in conducting the proceedings.

In the course of years, innumerable disputes have, as may be easily supposed, arisen as to procedure, and in order to prevent their recurrence in similar cases, and also to provide for the due management of business, rules have been from time to time laid down. Some of these, called the general orders of the court, have been promulgated by the chancellor, or more recently by the chancellor and other judges, acting for that purpose under legislative authority (*a*). These, not having been made merely for the purpose of deciding any particular case, are binding upon all the judges. Other rules have become established as rules of practice by being laid down in the course of deciding particular cases, and adopted subsequently by other judges as binding precedents. In the year 1852, The Improvement of Jurisdiction of Equity Act (*b*) was passed, and in the year 1860, all the then existing general orders were abrogated, and a new series was issued, which

General
orders of
the court.

(*a*) 15 & 16 Vict. c. 86, s. 63; *Short v. Roberts*, L. R. 2 Ch. 13.
and 23 & 24 Vict. c. 128. See (*b*) 15 & 16 Vict. c. 86.

consolidated and amended the former orders. These enactments and orders, with a few subsequent acts (c) and general orders and regulations, together with a vast collection of reported cases decided upon points of practice, now constitute the law of the court.

It would be tedious, and it is unnecessary for our purpose, to give any historical account of the various proceedings, when and how they originated, and how they gradually assumed their present form. We shall, therefore, confine our description to the practice as existing at the present time.

The bill.

A suit in chancery is commenced by filing in the office of the clerk of records and writs in chancery a document called a bill (d). This bill, a model of which is given in the schedule of the consolidated orders above referred to, is a petition addressed to the lord chancellor in a particular form. At the head of it appear the names of the parties to the suit, then follows an address to the person holding the great seal, the terms of which are prescribed by the court upon every change of the custody of the seal, or alteration in the style of the person to whom it is committed. The description and address of the plaintiff are then stated. After this is set forth a statement of all the facts and circumstances, and the purport, or sometimes even the words of the documents, upon which the plaintiff intends to rely. In this part is introduced any inference of law or fact which the plaintiff thinks it advisable to state, and there sometimes is added that which the plaintiff conceives will be the defence, together with the matter which he thinks sufficient to avoid such defence. This stating part of the bill is succeeded by the prayer, in which the plaintiff asks for the particular relief

(c) 21 & 22 Vict. c. 27 ; 25 & 26 Vict. c. 42 ; 23 & 24 Vict. c. 149.

(d) When the Attorney-General, as representing the crown, is plaintiff, the document filed is called an information, not being a petition.

Informations are often, but not always, filed at the "relation" of some person who takes the risk as to costs. They must, however, always be sanctioned by the Attorney-General.

he thinks himself entitled to, always (*e*) concluding with a prayer for general relief. The bill must be signed by counsel (*f*). It is printed, and a printed copy is filed (*g*). On it there is an indorsement equivalent to a writ or command from her majesty to the defendant to cause an appearance to be entered in the court (*h*). When the bill has been filed, a copy of it is stamped by the clerk of records and writs, which is served on the defendant; and if there be more than one defendant, such a copy is served on each. If the defendant be out of the jurisdiction, the court, upon application of the plaintiff, showing where he probably may be found, will order service upon him abroad, giving him a reasonable time to appear (*i*).

If the defendant, having been duly served with the bill, do not enter an appearance, the plaintiff may enter an appearance for him, so as to be able to proceed with the suit. After the appearance of the defendant, the next step, if the plaintiff wishes, as he usually does, to examine the defendant, and thus elicit information in support of his case, is to file (*k*), and then serve interrogatories (*l*), in which the plaintiff puts to the defendant such questions relative to the subject matter of the suit as he thinks proper (*m*).

Appearance
of defen-
dant.

Interroga-
tories.

(*e*) Except when the bill is merely to obtain discovery, and not asking for any relief, a bill which, now that common law courts have the power of interrogating parties, is comparatively rare.

(*f*) Cons. Order, viii. 1.

(*g*) Cons. Order, ix. 3. In cases where time is of urgent importance, a written copy is allowed to be filed; but a printed copy must be filed within fourteen days afterwards. *Ib.* r. 4.

(*h*) For the form of the indorsement, see the schedule to 15 & 16 Vict. c. 86; and Cons. Order, ix. 2.

(*i*) Cons. Order, x. 7. This or-

der has been, after much discussion, decided to give a general power to the court, as stated in the text. See *Drummond v. Drummond*, L. R. 2 Ch. 32.

(*k*) The interrogatories must be filed within eight days after the time limited for appearance of the defendant who is to be interrogated. Cons. Order, xi. 2.

(*l*) A form of interrogation is given in schedule B. of the Cons. Orders.

(*m*) Usually the interrogatories follow the bill, and require the defendant to answer seriatim as to the truth of each allegation in the bill, with such additional interro-

When interrogatories have been served, the defendant is bound to answer them within twenty-eight days (*n*), on pain of imprisonment; but the time will be readily extended on application to the court if a sufficient reason be given. The answer to the bill is the statement of the defendant made, on oath, in answer to the interrogatories; it usually constitutes the commencement of the defence to the suit: in it the defendant is bound to reply fully to every question in the interrogatories. But besides these replies, he may also state any facts which he thinks material to his defence. If he have not been interrogated, he may if he pleases, within a limited time (*o*), make a voluntary answer. An answer, like a bill, being an important part of the pleadings, must be signed by counsel; it is, like a bill, printed and filed. An answer is not however the only mode of defence.

If any ground of defence is apparent on the bill itself, either from the matter contained in it, or from some defect in its frame or in the case made by it, the defendant may, instead of answering it, demur to it; and this is then the proper mode of defence. A demurrer is an allegation by a defendant which, admitting for the purpose of argument the matters of fact alleged by the bill to be true, shows that as they are therein set forth they are insufficient for the plaintiff to proceed upon, or to oblige the defendant to answer (*p*). The grounds of demurrer are various; the commonest is, that the subject of the suit is not within the jurisdiction of a court of equity, or, what is much the same thing, that there is not stated in the bill such a case as entitles the plaintiff to any discovery or relief in a court of equity: other grounds are, that the plaintiff is not entitled to sue by reason of some

gatories as may be calculated to elicit the truth. It is not essential, however, to follow this course. See *Marsh v. Keith*, 1 Dr. & S. 342.

(*n*) Cons. Order, xxxvi. 4.

(*o*) Fourteen days after the last day for service of interrogatories.

(*p*) Mitford's Pleadings in Chancery, 107.

personal disability, or want of interest on his part; or, although the plaintiff may have an interest in the subject-matter, and may be under no disability, and may have a good title to sue, yet that the defendant is not the proper person to be sued by the plaintiff, either from not having any interest in the subject-matter of the suit, or from his not owing any duty to the plaintiff. Another ground of demurrer is, that complete justice cannot be done without other persons than those made parties to the suit being before the court (*q*); and that the bill is therefore defective for want of parties, and ought not to proceed. Another, and the last ground of demurrer which we need here mention, is that of multifariousness. The court will not permit a plaintiff to demand by one bill several matters of different natures against several defendants, or even, where the demands are clearly distinct in their character, against one defendant. A defendant may, therefore, demur to a bill open to this objection (*r*).

When a demurrer is put in to the bill, and the plaintiff does not admit its validity, the case is set down for argu-

(*q*) The demurrer for want of parties was formerly a fruitful source of annoyance and expense. This has been much diminished by the alteration made by the legislature in the rules of the court (15 & 16 Vict. c. 86, s. 42; Cons. Order, vii. 1, 2). The old rule, requiring the presence of every person who was materially interested in the subject-matter of the suit, arose from the extreme anxiety of the court to do complete justice, and prevent future litigation. The strictness with which it was applied often led to great practical injustice, from the difficulty and expense of complying with it. This led to its relaxation in several classes of cases, mentioned in the act and the orders.

(*r*) For illustrations of the several kinds of demurrers, see Mitford on Pleadings, ch. ii. s. 2, p. 1, and also J. W. Smith's Notes thereto. The demurrer for want of equity is the most frequent, that for multifariousness the next. The skill of draughtsmen, however, in preparing bills, renders demurrers not very common; sometimes, however, the plan of filing a bill in order that it may be demurred to, is adopted as a convenient means of quickly obtaining the opinion of the court upon the construction of an instrument, upon which the plaintiff in such a case founds his claim. The parties in such a case usually acquiesce in the decision upon the demurrer.

ment before the court. If the court thinks the demurrer is well founded, the decision is equivalent to a dismissal of the bill, and so terminates the suit as regards the demurring defendant. Sometimes, however, the court, whilst holding the demurrer to be well founded, yet considers the circumstances to be such that it ought not to put an end to the suit, but give the plaintiff an opportunity of making some alteration in the statement of his case. The court then allows the demurrer, but gives leave to the plaintiff to amend his bill. In such case the plaintiff usually has to pay the costs which have been incurred by the defendant up to that time. If the demurrer is, in the opinion of the court, not well founded, it is overruled, and the suit is in the same condition as if it had not been put in, the defendant having, however, generally to pay the costs occasioned by it.

Plea.

A third method of defence is by plea. A plea is of the nature of an answer to the bill, but is of a special kind, having no reference to any interrogatories which may have been filed. It may be described as a statement of some simple ground of defence, which does not appear on the face of the bill, but which would if it were in the bill render it demurrable. The grounds of pleas are very much like those of demurrers. The object of them is to save the expense of examination of witnesses at large; therefore it is not every good defence in equity that is good as a plea, for where the defence consists of a variety of circumstances, it is not proper for a plea, as the court would be giving judgment on the case before it is made out by proof (s).

Pleas are not much favoured by the court, and except where the fact pleaded is a bankruptcy of the plaintiff or defendant, taking away the right to sue or liability to be sued, or some other equally simple fact, they are rarely resorted to, and still more rarely succeed.

(s) Mitford, 219.

If a plea succeeds, there is an end of the suit ; if it fails, the suit proceeds as if none had been put in.

If the defendant, not succeeding in either demurrer or plea, puts in an answer, the plaintiff next considers whether the answer contains sufficient replies to his interrogatories. If it does not, he excepts to the sufficiency of the answer ; Exceptions to answer. which is done by filing a formal statement of his objections, called the exceptions. The exceptions, which must show accurately wherein the answer is deficient, are then argued before the court ; and if they are allowed, the defendant has to put in a further answer. This process continues until the plaintiff has, in the opinion of the court, obtained a complete answer to his interrogatories.

A plaintiff, after seeing the answer, often finds that the allegations contained in his bill are either incorrect or insufficient fully to exhibit his case to the best advantage. He is allowed at that stage, therefore, to amend his bill by making such alterations in it as he thinks proper, with this restriction only, that he must not by amendment entirely alter the character of the suit. Amendment of bill.

He may also introduce by amendment any fact which has occurred subsequently to the filing of the original bill (*t*). A bill may be amended at other stages of the suit besides after answer, and the changes which may be introduced by way of amendment are many and various ; new parties may be added and former parties struck out ; even a party originally plaintiff may be made a defendant ; additional relief may be asked, and the former prayer altered. Even at the hearing of a cause in court amendments are allowed ; and the hearing will in such a case be postponed for a few days, in order that they may be made (*u*). An order is in every case obtained from the

(*t*) This was not allowed until the act 15 & 16 Vict. c. 86, s. 53. It could previously only be done by filing a new bill, called a supple-

mental bill. See Mitford, 62.

(*u*) See *Tasker v. Small*, 3 M. & Cr. 63 ; *Maughan v. Blake*, L. R. 3 Ch. 32.

court giving leave to amend; such an order will, before the defendant has put in his answer, be given as of course (*i. e.* without the defendant being allowed to oppose it), as often as the plaintiff pleases. After an answer has been put in, one order to amend only will be granted as of course, and any further order can only be obtained if the court, after hearing the defendant, thinks proper to allow it.

The plaintiff may file interrogatories, and require an answer to his amended bill if he pleases; these new interrogatories are confined, however, to the subject-matter of the amendments, but the same process for insisting upon a sufficient answer that applied to the original bill is repeated for the amended bill.

Examina-
tion of
plaintiff.

If the defendant wishes to examine the plaintiff in the same searching manner in which he has himself been examined, he may do so. Formerly in order to do this, he was obliged to file a second bill, *i. e.* institute a second suit, called a cross suit (*x*), but now a defendant may, as soon as he has put in a sufficient answer (if required to answer), file interrogatories for the examination of the plaintiff, prefixing to such interrogatories a concise statement of the subjects on which discovery is sought. The plaintiff is bound to answer such interrogatories, in like manner as the defendant was bound to answer the plaintiff's interrogatories.

When the defendant has answered in an unexceptionable manner, and the plaintiff no longer wishes to amend his bill, the latter carefully considers the answer, and if he finds that upon the answer alone, without further proof, there is sufficient ground for a final order or decree (which rarely happens in hostile suits), he is bound to proceed

(*x*) A cross suit is even now sometimes necessary for complete defence; for instance, when one defendant wishes to obtain discovery from a co-defendant. The

right to file a cross bill is expressly reserved by the statute 15 & 16 Vict. c. 86, s. 19, which first authorised these interrogatories on the defendant's part.

upon the answer without entering into evidence (*y*). In such a case the cause is set down on bill and answer, the answer being assumed in the argument to be true (*x*). Hearing on
bill and
answer.

If, however, the plaintiff thinks, as usually happens, that evidence beyond the admissions in the answer is necessary to support his case, or if the defendant has not been required to answer, and has not answered, then there are two distinct courses open to the plaintiff, which differ in their effects principally as to the mode in which the evidence is taken. The plaintiff may at once put the cause in issue, by filing what is called a replication (*a*), and is equivalent to traversing or denying *in toto* the statements in the answer. Or he may serve a notice of motion for a decree (*b*). These two modes of bringing the cause to a hearing we will consider separately, but before doing so it may be here mentioned, that if he has required an answer, but the defendant has neglected to put one in, the plaintiff, besides taking steps to imprison him for contempt in not answering, may file a traversing note, which is a declaration of his intention "to proceed with his cause as if the defendant had filed an answer traversing the case made by the bill" (*c*). Traversing
note.

We will suppose now that the plaintiff has put the cause in issue by filing replication (*d*), he immediately gives notice that he has done so to the defendant, and each side then proceeds to verify his case by evidence. Replication.

In chancery, evidence is for the most part taken by affidavit, that is, by a written statement signed by the witness, to the truth of which he is sworn in the presence of certain officers of the court, (who are usually solicitors), appointed by the lord chancellor, and called "commissioners to administer oaths in chancery," of whom there are a great number residing in all parts of the kingdom. These affidavits when sworn are filed in the record Evidence.

(*y*) Cons. Order, xix. 1.

(*z*) *Ib.* 2.

(*a*) Cons. Order, xvii. 2.

(*b*) 15 & 16 Vict. c. 86, s. 15.

(*c*) Cons. Order, xiii. 1.

(*d*) Cons. Order, iii. 9.

and writ clerk's office, and copies of them for the use of the parties at the hearing are printed under the direction of the record and writ clerks (*e*). Sometimes, however, it is necessary, either from the refusal of a witness to make an affidavit, or for some other reason, to compel a witness to give evidence; when this is the case, the examination must of course be *viâ voce*. The witness is served by the party who desires to examine him with a writ of subpœna, to appear before one of the examiners of the court, of whom there are two. He is then examined *ex parte*, no person having a right to be present at such examination except the party producing the witness, his counsel, solicitor, and agents. The examination is put into writing by the examiner, and is then treated as an affidavit (*f*).

All the evidence in chief must be taken in the above modes, within eight weeks after issue is joined (*g*), and the cross-examination of all witnesses is taken before the court at the hearing (*h*), unless the witness be, through age, infirmity, or for some other good reason satisfactory to the court, incapable of being so cross-examined (*i*), or unless the parties agree otherwise (*k*).

Besides the above modes of taking evidence, it is competent for any party, within fourteen days after issue joined, to apply for an order that all the evidence, both in chief and on cross-examination, upon some particular issue of fact, should be taken *viâ voce* at the hearing (*l*).

(*e*) Gen. Order, 16 May, 1862, i.

(*f*) Gen. Order on Evidence, 5 Feb. 1861, r. 6. This order was made under the authority of an act (23 & 24 Vict. c. 128), passed for the purpose of giving effect to the recommendation of the chancery evidence commissioners.

(*g*) *Ib.* 5.

(*h*) *Ib.* 7. The onus of producing a witness to be cross-examined is

thrown upon the party whose witness he is. *Ib.* 19.

(*i*) *Ib.* 11.

(*k*) *Ib.* 10. There is also an exception in the particular case of a suit to perpetuate testimony. *Ib.* 16.

(*l*) Gen. Order, 5 Feb. 1861, r. 3. The introduction of oral evidence in court, either in chief or in cross-examination, is since the year 1860,

When an order of this kind has been made, the hearing, so far as concerns the issue of fact mentioned in the order, very much resembles a trial at *nisi prius* of a common law action, the judge taking both the part of judge and jury: a still greater resemblance, however, is allowed under the recent improvements of chancery practice, inasmuch as the court may, if it thinks fit, summon a jury to try before itself any question of fact which may arise in a suit. This trial by jury, however, will not, unless by consent of counsel on both sides, be directed until the cause has been actually brought to a hearing in the usual way (*m*), and it is completely in the discretion of the court whether a jury shall be summoned or not (*n*).

When the eight weeks allowed for taking evidence in the manner above explained have expired, or when any further enlarged time which the court may have allowed has expired, the evidence (except as to such issue, if any, as is to be tried before the court) is considered to be closed, and the cause is ripe for the hearing. The plaintiff accordingly sets it down in the registrar's book, and it comes on in its turn in court.

On hearing the cause, the court has, whatever may be the state of the evidence, or the mode in which parties have attempted to prove their cases, power to require the production and oral examination of any witness or party in the cause (*o*). This power is wholly discretionary on the part of the court, and will only be exercised with great care, and when the point on which further evidence is wanted is of great importance (*p*).

when the Improvement of Jurisdiction in Equity (15 & 16 Vict. c. 86) to which we have so often had occasion to refer, was passed.

(*m*) *George v. Whitmore*, 26 Beav. 557; *Bradley v. Bevington*, 4 Dr. 511.

(*n*) *Bovill v. Mitcheock*, L. R. 3 Ch. 417; and see *Fernie v.*

Young, L. R. 1 H. L. 63, where the principles and practice of the court, under the Chancery Amendment Act, 1858 (21 & 22 Vict. c. 27), and the Chancery Regulation Act, 1862 (25 & 26 Vict. c. 42), are fully explained.

(*o*) 15 & 16 Vict. c. 86, s. 39.

(*p*) Only, in fact, in those cases

Notice of
motion for
decree.

We come now to the course of preparing evidence in the other case, viz., where the plaintiff moves for a decree. The notice of motion which he must give to the defendant states that one month from its date he will move the court for a decree (*q*). Before serving the notice of motion for decree, the plaintiff must file all affidavits which he thinks material for his purpose, and he must, at the foot of his notice of motion which he serves upon the defendant, set forth a list of the affidavits which he intends to use at the hearing (*r*). It follows from this, that if the plaintiff wishes to use the evidence of witnesses who refuse to make affidavits on his behalf, he must not proceed in this manner, but must file replication; because, before giving the notice of motion, he cannot subpoena any witnesses, and after doing so he is too late (*s*). On the hearing of a motion for decree, the answer, if there be one, is treated as an affidavit (*t*). When the defendant has received notice of motion for decree, he of course has an opportunity of seeing at the same time the evidence of his adversary, because he can obtain copies of the affidavits from the office. He must then, within fourteen days after service of the notice, file his affidavits in answer to the plaintiff's case (*u*). If he wishes to examine an unwilling witness, he has now an opportunity of doing so; he serves a subpoena on the witness to appear before an examiner of the court (*x*). The examination in this case would, it would

in which formerly the court used to send an issue to be tried by a jury before a common law judge, a practice which no longer exists. *Wilkinson v. Stringer*, 9 Hare, App. xxiii.; *Ferguson v. Wilson*, 36 L. J. Ch. 67.

(*q*) 15 & 16 Vict. c. 86, s. 14; Cons. Order, xxxiii. r. 4.

(*r*) *Ib.* and r. 5.

(*s*) *Coles v. Morris*, L. R. 2 Ch. 701.

(*t*) 15 & 16 Vict. c. 86, s. 15.

(*u*) Cons. Order, xxxiii. 6. The time is readily enlarged upon application to the court.

(*x*) This seems to be the effect of 15 & 16 Vict. c. 86, s. 40, as that section appears to apply to the examination of a witness by a defendant, after notice of motion for decree. See *Coles v. Morris*, L. R. 2 Ch. 701; and *Wigan v. Rowland*, 10 Hare, App. xviii.; *Wilhelm v. Reynolds*, 8 W. R. 625.

seem, be conducted in the presence of both parties, and the witness would be subject to cross-examination and re-examination (*y*).

When the defendant has completed his evidence and filed it, the plaintiff has an opportunity of filing further evidence in reply. Seven days are allowed for this (*z*), after which time no further evidence on either side can be put in to be used on the hearing of the motion for decree (*a*). But if either party wishes to cross-examine any witness whose affidavit has been filed, he may give a notice to the party on whose behalf the affidavit was filed of his desire to cross-examine, and such party must produce the witness before an examiner to be cross-examined, otherwise he cannot use the affidavit without special leave of the court (*b*).

The hearing of the motion for decree in most cases has the same effect as the hearing of the cause (*c*). The court can either make a decree exactly as if the cause had been brought to a hearing by joining issue, or it may dismiss the bill, and so put an end to the suit, to the overthrow of the plaintiff.

On comparing the method of taking evidence just described with that where the cause is brought to issue by replication, we see the great difference between them. When the cause is brought to issue, all

(*y*) 15 & 16 Vict. c. 86, ss. 31, 40. The words in section 40, that the witness shall be examined "in like manner, as such witness would be bound to attend and be examined with a view to the hearing of a cause," seem properly to be referred to s. 31, and not to the manner in which, under the later General Order of 1861, witnesses are examined with a view to the hearing of the cause.

(*z*) Cons. Order, xxxiii. 7. It would seem, that at this stage a plaintiff may summon an unwilling

witness before the examiner, under 15 & 16 Vict. c. 86, s. 40, but the evidence extracted from him must be strictly in reply to the defendant's evidence.

(*a*) *Ib.* r. 8.

(*b*) Gen. Order, 5 Feb. 1861, r. 19.

(*c*) There have been cases where the motion for a decree has been simply refused, without prejudice to the plaintiff bringing the cause to a hearing by filing replication. *Thomas v. Barnard*, 5 Jur. N. S. 31.

the evidence in chief is put in, without an opportunity being given to either party of seeing the evidence in chief of the other side: but each side, having power to obtain copies of all the evidence on the file, knows, before the hearing, all the evidence that is to be brought against him, and has an opportunity of considering the course to be adopted as to cross-examination; and he also has the great advantage of that cross-examination being in open court. The only exception to this previous knowledge is where there is to be a trial of an issue of fact before the court with a jury, or before the court sitting as both judge and jury; in which case the trial is, as we have already mentioned, conducted exactly like a trial at *nisi prius*.

In the case of motion for decree, on the other hand, each side has an opportunity of seeing his adversary's evidence before completing his own. There is also usually much less oral examination, and there is none whatever before the court.

We have now arrived at an important point in the history of a suit, that where a decree is made. A few remarks here arise upon the different characters which suits in chancery possess which lead to very different results as to the position which the litigation takes at the time a decree is made and its subsequent history.

There are many suits where the object is to obtain redress for some grievance, and as soon as the grievance is proved, and an order of the court made for its redress, the whole litigation is at an end. In an ordinary action at law, this is nearly always the case. The object for which a man brings an action is damages, and as soon as a verdict and judgment have been arrived at, the plaintiff has obtained everything which the court can give, nothing then remaining to be done in the action except to enforce, by the aid of the sheriff, the execution of the judgment. But in chancery it is often quite different; in a very large number of instances a single order can by no means fulfil the whole requirements of the suitors. It often happens,

particularly in those numerous suits where the court undertakes administrative business, that the action of the court must be continued for a great length of time, even for the lifetime of individuals. In these cases the decree, though in some respects the most important order which the court makes, is not the only order, and indeed is often not the order which decides the main questions in controversy between the parties. It often follows, therefore, that when the court makes a decree in accordance with the prayer of the bill, or in accordance with what it considers to be the rights of the parties, there remains still a great deal for the court to decide. The suit has a history subsequent to the decree which is as important as that of the earlier part. We will take two instances as illustrations. Suppose a man dies, leaving a number of debts, and also property: and a creditor thinks it necessary to require the estate to be administered by the court, the prayer which he makes is, that the court shall undertake the administration. The creditor in such a suit only takes care to satisfy the court that he has a claim, and that the persons who are made defendants are the persons in whom, by representation, either as executors or administrators, devisees, or heirs-at-law, the property of the deceased is legally vested.

The decree which is made in answer to such a prayer is that the estate shall be administered by the court; it also gives directions that certain inquiries shall be taken by the court, such as an inquiry what property the deceased was possessed of, where the property is and in whose possession, what debts the deceased owed, and who are entitled to the property subject to the payment of debts; and it directs that the property be applied in a due course of administration. The decree of course takes various forms to suit the particular circumstances of each case (*d*). It is obvious in this case that the decree is but

(*d*) The case described in the text is one for which the legislature has recently provided peculiar facilities, shortening the processes to be gone

the first step towards attaining the object of the suit. After the decree is made, all questions which arise as to the validity of claims of creditors, the construction of the will, the proofs of heirship, and so on, are decided by subsequent proceedings. Another case, which we may take, does not at first sight so clearly show why a final order may not be made at once. Suppose a mortgagee wish to exercise his right of foreclosing the equity of redemption of his mortgagor, that is, make himself absolute owner of the mortgaged property. It might seem that, if he proves by his evidence that the debt is still owing, and if, before the decree is made, the mortgagor does not pay, a final decree might be made. The court, however, according to its ancient customs, will not do this except in very special cases (*e*), or by consent of the parties. It always requires the accounts to be taken between the parties in a formal manner, and gives the mortgagor a very considerable period (always six months, and usually nine months), after the amount due has been ascertained, to pay the money: and it is only after proof of default in payment at the end of this time that it makes a final order barring the mortgagor from all interest in the property.

It will be seen that in this case the course adopted by the court, arises out of the extreme tenderness of the court in avoiding the slightest appearance of a harsh or oppressive exercise of strict legal rights.

Many other of the various complications which the court introduces into its decrees, also arise from the same anxious desire to do complete justice between the parties, and to insist upon the observance by the plaintiff seeking

through before the decree is made, (see 15 & 16 Vict. c. 86, ss. 45 and 47); but the decree, when made, is exactly of the same character as it used to be when the regular course of proceedings was travelled over.

(*e*) *E. g.* if the mortgaged property belong to an infant, and the

mortgage debt be more than its value, and it be proved clearly to the court that it would be for the advantage of the infant that the mortgagee should take the property in discharge of his debt. See Seton on Decrees, 685.

the aid of the court, of the duty which he owes to the defendant. It is with this view, also, that in every proceeding before the court, the costs incurred by the parties are paid in such manner as the court, which has always reserved to itself the most ample discretion upon this point, directs (*f*). A bill is often dismissed without costs, that is, each party has to pay his own costs, even though the plaintiff fails to establish his case: sometimes, even, a victorious party has to pay all the costs of both sides (*g*).

Before describing the course of events subsequent to the decree, we must here revert to the earlier period of the suit, in order to notice certain proceedings which, though often of the highest importance, yet are not part of the regular course of the suit. From what we have seen, it is obvious that in a hostile suit there often may be considerable delay before the cause can be heard and a decree made. It seldom happens in such a suit that the interval is less than three or four months; it is often much longer. But in many cases such a delay would be absolutely fatal to the plaintiff's hopes of relief, unless some earlier interference for his protection could be obtained; moreover the parties often require, as we have seen, particular orders relative to the conduct of the proceedings. The court, therefore, permits the parties at any stage of the suit to make applications to it. Such applications are made for various purposes, and may be made in several ways, either by summons obtained at the chambers of the judge, in which case the order is made by the judge in chambers or his chief clerk, after hearing the parties on the day when the summons is returnable; or

(*f*) Very different from the rule at law, where the defeated party invariably pays all the costs, except in the case of nominal damages.

(*g*) *E. g.*, in a simple redemption suit the plaintiff pays all the costs,

even though he succeeds in redeeming; though if an improper defence be set up, the defendant will be made to pay any extra costs occasioned thereby.

by motion in court; or, thirdly, by a formal petition addressed to the court.

The summons in chambers is usually adopted only for less important matters, and need not here be dwelt upon. Formal petitions, for matters of any consequence, are rarely presented before decree. Motions are the principal proceedings to which we now refer. A motion is a mere interlocutory application, and is sometimes made without giving any notice to the other side, but usually is made after giving two clear days' notice (*h*).

We do not intend here to enumerate all the different orders which the court will make upon motion; the general principle is, that if time is of such importance that great danger may ensue unless something be done before the cause can come to a hearing, the court will interfere and make such a temporary order as will prevent any such disastrous consequences; taking care, however, as far as possible, that if, upon the more thorough investigation of the facts which the complete evidence given at the hearing allows, it should turn out that the order made upon a motion was wrong, then it can restore the party against whom such order was obtained to as good a position as he was in previously.

If, therefore, the plaintiff asks for some order which may prove detrimental to the defendant, and, according to the evidence furnished upon the motion, there appears a possibility that the detriment so incurred would be an injustice to the defendant, the court will, as a price for its early interference, put the plaintiff upon terms to indemnify the defendant in case of the injustice being proved.

The most common of the important orders asked for on motion, are orders for injunctions. A few words may be

(*h*) Cons. Order, xxxiii. 2. If an order is obtained without giving notice, the other side may make a motion to discharge it; a motion made upon notice cannot be so discharged, as the merits are discussed, each side bringing forward its evidence.

said as to these, which will illustrate the proceeding by motion. An injunction is a writ issuing out of the court, commanding the person against whom it is addressed to abstain from doing some specified thing, upon pain of imprisonment for contempt of court. When the injunction is to restrain the defendant from proceeding with an action in a court of law, or some other court, it has been called a common injunction. When it restrains the defendant from doing some specified act, such as cutting down timber, digging mines, infringing a copyright or trade mark, it is called a special injunction. Formerly there was some difference between the practice in respect to the two kinds of injunctions, but now the distinction is unimportant (*i*). An injunction will not, before decree, be granted unless there is a special prayer in the bill for one. When it is intended to move for an injunction, a notice is served upon the defendant, stating that counsel will move the court on a named day, which must be one of the days which are set apart for motions (*k*). Each side then has an opportunity of filing affidavits in support of or against the motion, and this evidence can continue to be put in until the motion is heard. On the motion days the court asks each counsel in turn, according to seniority (*l*), whether he moves anything, and thereupon counsel makes the motion in the terms of the notice, and the argument ensues; but there is no previous formality of setting it down with the registrars, as is done when the cause is heard (*m*).

As soon as the order for an injunction is made, and

(*i*) 15 & 16 Vict. c. 86, s. 58.

(*k*) Special orders can in proper cases be obtained varying the practice, so as, for instance, to allow a motion to be brought on upon a day not one of the seal days.

(*l*) On the last day of term it is usual for the court to call upon the

utter bar before the queen's counsel.

(*m*) When an order made on motion is appealed against, a notice of the motion, by way of appeal, is lodged with the registrar, and it appears in the court paper, and is called on by the registrar.

notice of it given to the defendant, he is bound to obey it, although the writ itself be not issued till later.

Injunctions granted on motion before decree will, in accordance with what has been said, only be of a temporary character, generally until the hearing of the cause or further order. Sometimes, however, the discussion on the motion involves the whole merits of the suit; in such a case it is not uncommon for the parties to agree that the motion be treated as the hearing, all formalities being waived. To this the court readily consents, and in such a case a chancery suit may be instituted and ended within the space of a few days.

When there no longer remains any property under the control of the court, and no further question between the parties arising out of the certificates made in the inquiries in chambers, a suit in chancery comes to an end. It often happens, however, that before that consummation of events can be arrived at, proposals are made for a compromise. Of course if all the parties interested are *sui juris*, a compromise may be made at any time without the sanction of the court; but where, as in chancery so often is the case, infants or married women are interested, a compromise of doubtful rights can only be made with the permission of the court. This is given if, after a full disclosure of the facts, the court is satisfied that it will be for the real benefit of the person so under its protection that the compromise should be carried out (*n*), in which case alone will the compromise be binding.

The proceedings which take place after a decree is made will not detain us long. They consist usually of the following:—first, a prosecution of inquiries into facts, such as pedigrees, titles to property, and accounts. This is done in the chambers of the judges by their chief clerks: except where any point of difficulty arises, when the matter

(*n*) See, for the principles upon which compromises on behalf of infants will be supported or upset, *Brooke v. Lord Mostyn*, 2 De G. J. & S. 373.

is brought before the judge himself; for which purpose the judges, *i. e.* the master of the rolls and the vice-chancellors (not the judges of the court of appeal, for they only sit in court), attend in chambers in the afternoon after the rising of the court. As soon as these inquiries and accounts have been finished, a certificate is made out by the chief clerk stating the result (*o*). This forms the basis of fact for the subsequent steps in the cause, the principal of which is the further consideration. The party who has the carriage of the decree, *i. e.* the plaintiff in many though not all cases, sets down the cause to be heard upon further consideration, and it takes its place in the court paper, and is called on in court in its turn. It is on this second hearing, if we may so term it, that in administration suits the great contest upon the construction of wills or other similar documents takes place. The certificate informs the court of all the persons who can set up any claim; and each person mentioned in the certificate, and having a possible interest, appears at the hearing of the further consideration by his counsel and argues in support of his rights. It is to be noticed, that under the modern practice, a decree may be made in a suit for the administration or protection of property (*p*), with only a few of the persons interested being parties. But the court requires that all persons who by the chief clerk's certificate are shown to have any interest, or possible interest, should be served with notice of the decree, so that they may be bound by the proceedings, and that they may have an opportunity of appearing at the further consideration. A suit cannot in many cases be entirely disposed of even on the further consideration, because it may be

(*o*) As to the form of the certificate, see *Macintosh v. Great Western Railway*, 1 De G. J. & S. 443, in which the taking the accounts had occupied the chief clerk for two days in the week during nearly

six years. See S. C. 2 New Rep. 11.

(*p*) 15 & 16 Vict. c. 86, s. 42, where rules as to parties are laid down.

that persons who finally become entitled to the corpus of the estate which is being administered, may at that time not even be born. A suit in such cases necessarily remains in a quiescent state for years, the property being, however, retained under the protection of the court. When through the happening of events, such as the deaths of tenants for life, or the attainment of their majority by infants, it becomes necessary again to come to the court for an order; the usual mode of obtaining the order is by the presentation of a petition. A petition, as we have before said, may be presented at any stage of the suit, the most important petitions are those to which we now refer, the object of which is to obtain an order for the payment or transfer of money or stock in the hands of the accountant-general of the court, to which money or stock, by such events as above-mentioned, a new title has accrued to some person, or an order for conveyance of lands under similar circumstances.

Petitions state all the facts fully, though concisely. They are presented to the lord-chancellor (except in the case of one intended to be heard by the master of the rolls when it is presented to that judge), who receives them by his secretary. The petition is indorsed by the secretary with a direction that all parties should attend the court on a day named: this is called answering the petition. A copy of the petition is then served upon all parties interested, and on the proper day it appears in the court paper, and is called on in its turn. It must be supported by evidence which consists either of certificates previously made in the cause, or formal evidence of the facts upon which the title in question depends. The court exercises considerable caution in making the order, and herein consists the great value of an administration by the court (*q*).

(*q*) The court however necessarily relies, to no inconsiderable extent, upon the faith reposed in solicitors,

which, when abused, may lead to disastrous consequences. It therefore requires, under penalty of their

We have thus traced the history of a suit through all the stages of its progress: many of these by consent of the parties, or the natural requirements of the case, are often omitted, and the duration of the suit proportionately shortened. It only remains here to notice those cases where, by special legislative enactment, proceedings in chancery are taken either by a shortened form of suit, or by summary application without suit. Where the object of the suit is the administration of the personal estate of a deceased person, or even in certain cases his real estate, a decree for the administration may be obtained without filing a bill, but by a simple summons in chambers served upon the executor or administrator, or a devisee of real estate entrusted by the will with a power of sale (*r*).

From what we have recently said, in these cases the main value of the proceedings depends upon what takes place after decree, therefore it is a great advantage to avoid the delay and expense of the pleadings and other matters which in a regular suit precede the decree. In most of the other cases to which reference was made in the last chapter (*s*), the summary application to the court is made by a petition, entitled or headed with the name of the act, and of the name of the subject-matter of the proceeding. The only case in which a summary application of this kind is, according to the practice, made by a simple motion, is where the application is to rectify the register of a joint-stock company, under the 35th section of the Companies' Act, 1862. But sometimes the method of proceeding by summons, for the purpose of originating proceedings, is adopted, as in a case under the Charitable Trust Act, 1853 (*t*).

being struck off the rolls, the most rigid attention to honourable conduct on the part of solicitors. See *In re Collins*, 7 De G. M. & G. 558.

(*r*) See 15 & 16 Vict. c. 86, ss. 45, 47. Where the only question is

one of construction of a document or of title a special case may be stated under Sir George Turner's Act, 13 & 14 Vict. c. 35.

(*s*) Pages 79—82.

(*t*) Cons. Order, xli. r. 10.

CHAPTER VII.

THE SUPERIOR COURTS OF LAW.

FOLLOWING the plan indicated in the three preceding chapters, we shall next consider the superior courts of common law, their jurisdiction, and the proceedings in an action—of which subjects that first mentioned will, in anticipation of organic changes in this part of our system of judicature, be very briefly noticed.

By the ancient Saxon constitution there was only one superior court of justice in the kingdom; and that court had cognisance both of civil and spiritual causes: *viz.* the *wittena-gemote*, or general council, which assembled annually or oftener, wherever the king kept his Christmas, Easter, or Whitsuntide, as well to do private justice as to consult upon public business. After the Conquest the ecclesiastical jurisdiction was gradually diverted into another channel; and a court was established which sat in the king's hall, thence called by Bracton (*a*), and other ancient authors, *aula regia*, or *aula regis* (*b*). This court

(a) L. 3, tr. 1, c. 7.

(b) This court (says Mr. Millar, Eng. Gov. vol. ii. p. 108) corresponded in constitution and origin with that tribunal which, after the accession of Hugh Capet, was gradually formed out of the ancient parliament of France. It corresponded also with the Aulic council which, after the time of Otho the Great, arose out of the Diet of the German Empire. There is reason

to believe that in every considerable European kingdom the progress of the feudal system gave rise to a similar institution, which became detached from the national council by connivance, rather than by any positive appointment. The same writer remarks that, although in England the institution of the King's Council is commonly ascribed to William the Conqueror, yet this must be understood with

was composed of the king's great officers of state resident in his palace, and usually attendant on his person: such as the lord high constable and lord marshal, who chiefly presided in matters of honour and of arms; determining according to the law military and the law of nations. Besides these, there were the lord high steward, and lord great chamberlain; the steward of the household; the lord chancellor (*c*); and the lord treasurer, who was the principal adviser in all matters relating to the revenue. These high officers were assisted by certain persons learned in the laws, who were called the king's justiciars or justices; and by the greater barons of parliament, who sat in the *aula regia*, and formed a kind of court of appeal, or rather of advice, in matters of great moment and difficulty. All these in their several departments transacted secular business, criminal and civil, and likewise attended to matters connected with the revenue: whilst over all presided one special magistrate, called the chief justiciar (*d*) or *capitalis justiciarius totius Angliæ*; who was also the principal minister of state, the second man in the kingdom, and by virtue of his office guardian of the realm in the king's absence. This officer, from the plenitude of his power, grew at length both obnoxious to the people and dangerous to the government which employed him (*e*).

The *aula* or *curia regis* being bound to follow the king's household in his progresses and expeditions, the trial of common causes therein was found very burdensome to the subject. Wherefore king John, who dreaded also the power of the justiciar, readily consented to that article which forms the eleventh chapter of *Magna Carta*, and enacts, that "*communia placita non sequantur curiam*"

Origin of
the three
superior
courts of
law.

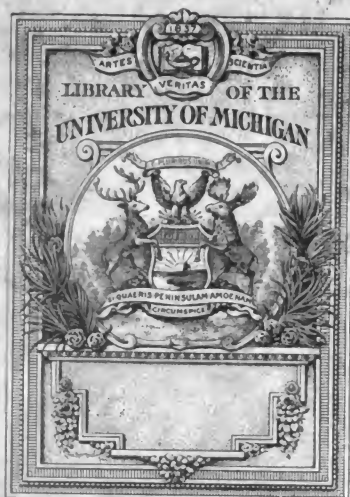
reference to the first appearance of that court as distinct from the legislative assembly, rather than with reference to its final and complete establishment.

(*c*) *Ante*, p. 32.

(*d*) *Ante*, p. 36.

(*e*) Spelm. Gl. 331, 2, 3; Gilb. Hist. C. P. Introd. 17.

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COMMENTARIES
ON
THE LAWS OF ENGLAND.

BY

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ADDENDA ET CORRIGENDA.

- Page 13 n. (k). The law will, after the close of this year (1869), be regulated by 32 & 33 Vict. c. 71, s. 36.
- 14 n. (o). Add reference to *Anderson's Case*, "L. R. 3 Eq. 337."
- 15 n. (r). After "*Alvanley v. Lewis*," insert "1."
151. The statute 9 & 10 Vict. c. 95, is amended as regards some not very important particulars, by the 27 & 28 Vict. c. 95.
- 312 n. (i), line 2. For "on," read "or."

COMMENTARIES

ON THE

LAWS OF ENGLAND.

BOOK THE THIRD.

PRIVATE WRONGS.

CHAPTER I.

REDRESS OF PRIVATE WRONGS BY THE ACT OF THE PARTIES.

AT the opening of these Commentaries (*a*) municipal law was in general defined to be, “a rule of civil conduct, prescribed by the supreme power in a state, commanding what is right, prohibiting what is wrong (*b*), and regulating matters in themselves indifferent.” Hence therefore it followed, that the primary objects of our law are the establishment of rights, and the prohibition of wrongs. And this occasioned the distribution of these collections into two general heads (*c*); under the former of which we have considered the rights that were defined and esta-

(*a*) Vol. I. pp. 37, 38.

Philipp. 12; Bract. l. 1, c. 3.

(*b*) *Sanctio justa, jubens honesta,*
et prohibens contraria; Cic. 11,

(*c*) Vol. i. chap. 1.

blished, and under the latter we are now to consider the wrongs, including torts and breaches of contract, that are forbidden, and redressed by the laws of England.

Wrongs are private or public.

Wrongs are divisible into two sorts or species; private wrongs, and public wrongs. A private wrong is an infringement or privation of some private or civil right belonging to an individual, and may be termed a civil injury: a public wrong is a breach and violation of some public right and duty, which affects the whole community; and is distinguished by the harsher appellation of a crime. To investigate the first of these species of wrongs, with the remedies appropriate thereto, will be our employment in the present Book; and the other species will be reserved till the next or concluding Volume.

The redress for a private wrong is by parties themselves, by operation of law, or by suit or action.

The more effectually to accomplish the redress of private injuries, courts of justice are instituted in every civilized society, in order to protect the weak from the insults of the stronger, by expounding and enforcing those laws, by which rights are defined, and wrongs prohibited. This remedy is therefore principally to be sought by application to these courts of justice; that is, by civil suit or action. For which reason our chief employment in this Volume will be to consider the redress of private wrongs, by suit or action in court. But as there are certain injuries of such a nature, that some of them furnish and others require a more speedy remedy, than can be had by the ordinary forms of justice, there is allowed in any such case an extrajudicial or eccentric kind of remedy; of which I shall first treat, before considering the several remedies by suit and action: and, to that end, shall distribute the redress of private wrongs into three several species: first, that which is obtained by the mere act of the parties themselves; secondly, that which is effected by the mere act and operation of law; and, thirdly, that which arises from suit, action, or other proceeding in court, and consists in a conjunction of the other two, the act of the parties co-operating with the act of law.

And, first of that redress of private injuries, which is obtained by the mere act of the parties. This is of two sorts; I. That which arises from the act of the injured party only; and, II. That which arises from the joint act of all the parties together.

I. Of the former sort, or that which arises from the sole act of the injured party, is, Redress by act of the parties.
I. By sole act of party injured.

1. The defence of one's self, or the mutual and reciprocal defence of each other by husband and wife, parent and child, master and servant (*d*). For if the party himself, or any one thus related to him, be forcibly attacked in person or property, it is lawful for him to repel force by force; and the breach of the peace, which happens, is chargeable upon him only who began the affray (*e*). 1. Self-defence.

The law, in this case, respects the passions of the human mind; and (when external violence is offered to a man himself, or one to whom he bears so near a connexion) makes it lawful in him to do himself that immediate justice, to which he is prompted by nature, and which no prudential motives are strong enough to restrain. The future process of law may be by no means an adequate remedy for an injury accompanied with force; and it is impossible to say, to what wanton lengths of rapine or cruelty an outrage of this sort might be carried, unless it were permitted a man immediately to oppose one violence with another. Self-defence, therefore, as it is justly called the primary law of nature, so is not, neither can it be in fact, taken away by the law of society. In the English law particularly it is sometimes held to furnish an excuse for a breach of the peace, nay even for homicide itself (*f*); but care must be taken, that the resistance does not ex-

(*d*) It is said (*Levard v. Basely*, 1 Ld. Raym. 62, and Bul. N. P. 18) that a master cannot justify an assault in defence of his servant, because he might have an action *per quod servitium amisit*. But according to 2 Rol. Abr. 546, D. pl.

2; *Seaman v. Cuppledick*, Owen, 151; Bac. Abr. Master and Servant, P., such an interference by the master is lawful.

(*e*) 2 Rol. Abr. 546; 1 Hawk. P. C. 483, s. 23.

(*f*) *Post*, vol. iv.

ceed the bounds of mere defence and prevention ; for then the defender would himself become an aggressor.

2. Recap-
tion.

2. Recaption or reprisal is another species of remedy by the mere act of the party injured. This happens, when any one has deprived another of his property in goods or chattels personal, or wrongfully detains one's wife, child, or servant : in which case the owner of the goods, the husband, parent, or master, may lawfully claim and retake such property or person, wherever found ; so it be not in a riotous manner, or attended with a breach of the peace (*g*). The reason for which is obvious ; since the owner may have this only opportunity of doing himself justice : his goods might be afterwards conveyed away or destroyed ; and his wife, child, or servant, concealed or carried out of his reach ; if he had no speedier remedy than the ordinary process of law. If therefore where personal property has been forcibly taken its rightful owner can so contrive as to regain possession of it, without violence or terror, the law favours and will justify his proceeding (*h*). But as the public peace must be considered rather than any one man's right of property ; and as, if individuals were once allowed to use private force as a remedy for private injuries, all social justice must cease, the strong would give law to the weak, and every man would revert to a state of nature ; for these reasons it is provided, that this natural right of recaption shall never be exerted, where such exertion must occasion strife and bodily contention, or endanger the peace of society. If, for instance, my horse is taken away, and I find him on a common, at a fair, or at a public inn, I may lawfully seize

(*g*) 3 Inst. 134 ; Hale, Anal. s. 46. Where goods have been obtained with a preconceived design of not paying for them, the seller may lawfully retake them from the party who obtained them, for the fraud vitiates the sale, and prevents the

property from passing by it, *Earl of Bristol v. Wilmore*, 1 B. & Cr. 514.

(*h*) *Burridge v. Nicholls*, 6 H. & N. 383 ; *Smith v. Wright*, *Id.* 821.

him to my own use ; but I cannot justify breaking open a private stable, or entering on the grounds of a third person, to take him, except he be feloniously stolen (*i*) ; but must have recourse to an action at law.

3. As recaption is a remedy given to the party himself, ^{3. Re-entry on land.} for an injury to his personal property, so, a remedy of the same kind for an injury to real property is sometimes permitted by entry on lands and tenements, when another person without any right has taken or retains possession thereof. This depends in some measure on like reasons with the former ; and like that too must be peaceable and without force or violence which might endanger the public peace. There is some nicety required in defining and distinguishing circumstances in which such entry might be lawful or otherwise ; and especially in determining whether notice should be given before re-entry and eviction to the person who is wrongfully in possession (*k*).

4. A fourth species of remedy by the mere act of the party injured, is the abatement, or removal of a nuisance. ^{4. Abatement of nuisance.} What a nuisance is, we shall find a more proper place hereafter to inquire. At present we may observe generally, that whatsoever unlawfully annoys or does damage to another, is a nuisance ; and such nuisance may sometimes be abated, that is, taken away or removed, by the party aggrieved thereby, so as he commits no riot in the doing of it (*l*). If a wall is erected so near to my house that it stops my ancient lights, which is a private nuisance, I may enter my neighbour's land, and peaceably pull it down. Likewise if a bar or gate be wrongfully erected across the public highway, which is a common nuisance, any of the queen's subjects passing that way may, if necessary for the exercise of that right, cut it down and destroy

(i) 2 Roll. Rep. 55, 56, 208 ; 2 Roll. Abr. 565, 566.

Exch. 261 ; 14 M. & W. 442.

(k) *Newton v. Harland*, 1 M. & Gr. 644 ; *Harvey v. Bridges*, 1

(l) *Penruddock's Case*, 5 Rep. 100 ; *Baten's Case*, 9 Rep. 55.

it (*m*). And the reason why the law allows this private and summary method of doing one's self justice, is because injuries of this kind, which obstruct or annoy such things as are of daily convenience and use, require an immediate remedy; and cannot wait for the slow progress of the ordinary forms of justice.

Before proceeding to abate a nuisance, a notice to remove it is sometimes requisite (*n*).

5. Distress.

5. A fifth case, in which the law allows a man to be his own avenger, or to minister redress to himself, is that of distress, whether for rent in arrear or damage feasant, which has been noticed in our preceding volume.

6. Seizure of heriot.

6. The seizing of a heriot when due on the death of a tenant is another species of self-remedy, likewise already noticed (*o*).

II. Remedy by joint act of all the parties.

II. Such being the several remedies which may be had by the mere act of the party injured, those will next be mentioned which arise from the joint act of all the parties.

1. Accord and satisfaction.

1. Accord and satisfaction as between the party injuring and the party injured, will bar an action for such injury. If a man contract to build a house or deliver a horse, and fail in it; for this breach of contract the sufferer may have his remedy by action; but if he accept a sum of money, or other thing, as a satisfaction, this may operate as a redress of his grievance, and entirely take away his right

(*m*) *Dimes v. Petley*, 15 Q. B. 276; *Bateman v. Bluck*, 18 *id.* 870. In *Hyde v. Graham*, 1 H. & C. 598, Pollock, C. B., referring to the instances above given, "where a person is allowed to obtain redress by his own act, as well as by operation of law," (*post*, p. 11,) observes that such "occasions are very few," and "might constantly lead to breaches of the peace; for if a man has a right to remove a gate placed across the land of another,

he would have a right to do it even though the owner was there and forbid him. The law of England appears to me, both in spirit and on principle, to prevent persons from redressing their grievances by their own act."

(*n*) *Jones v. Williams*, 11 M. & W. 176; *Perry v. Fitzhove*, 8 Q. B. 757; *Davies v. Williams*, 16 *id.* 546; *Dimes v. Petley*, 15 *id.* 276.

(*o*) *Ante*, vol. ii.

of action (*p*). But payment of a less sum cannot be *per se* an accord and satisfaction of a greater ascertained sum (*q*).

2. Arbitration is where the parties, injuring and injured, submit matters in dispute, concerning any personal chattel or personal wrong, to the judgment of two or more arbitrators, who are to decide the controversy; and if they do not agree, it is usual to add, that another person be called in as umpire (*imperator* or *impar* (*r*)), to whose sole judgment it is then referred (*s*): or one arbitrator may be originally appointed. The decision, in any such case, is called an award. And, if the award stands, the question is thereby as fully determined, and the right, which was in contest, transferred or settled, as it could have been by the agreement of the parties or the judgment of a court of justice. The right to real property, however, could not formerly have thus passed by a mere award (*t*): which subtilty had its rise from feudal principles; for if this had been permitted, the land might have been aliened collusively without the consent of the superior. But an arbitrator may now award a conveyance or a release of land; and it will be a breach of the arbitration-bond to refuse compliance (*u*). For though originally the submission to arbitration used to be by word or in writing, yet both of these being revocable in their nature, it became a common practice for the parties to enter into mutual bonds, with conditions to stand to the award of the arbitrators therein named. And experience having shown the great use of these peaceable and domestic tribunals, especially in matters of account, and other mercantile transactions, which may be difficult of adjustment on a trial at law, the legis-

c. Arbitration.

(*p*) *Blake's Case*, 6 Rep. 43; *Peyton's Case*, 9 Rep. 79.

(*q*) *Sibree v. Tripp*, 15 M. & W. 23.

(*r*) Whart. Angl. Sacr. i. 772; Nicols. Scot. Hist. Libr. ch. 1,

prope finem.

(*s*) See 17 & 18 Vict. c. 125, s. 14.

(*t*) 1 Roll. Abr. 242; *Marks v. Marriot*, 1 Ld. Raym. 114, 115.

(*u*) And see the 17 & 18 Vict. c. 125, s. 16.

lature has by several statutes sanctioned the use of arbitrations as well in controversies depending in court, as in those where no action has been brought. By 9 & 10 Will. 3, c. 15, it was enacted, that all merchants and others, desirous of ending any controversy, suit, or quarrel (for which there is no other remedy but by personal action or suit in equity), may agree, that their submission of the suit to arbitration or umpirage shall be made a rule of court, and may insert such agreement in their submission, or in the condition of the arbitration-bond (*x*): which agreement being proved upon oath by one of the witnesses thereto, the court shall make a rule that such submission and award shall be conclusive; and, after such rule made, the parties disobeying the award shall be liable to be punished, as for a contempt of the court; unless such award be set aside for corruption or other misbehaviour in the arbitrators or umpire (*y*), proved on oath to the court, within one term after the award is made. Under this statute, the superior courts interfered to set aside awards when partially or illegally made; or to enforce their execution, when legal, by process of contempt.

By the above statute, however, of 9 & 10 Will. 3, a parol submission could not be made a rule of court, and the remedy by arbitration still remained defective; for a party might at any time before the award was made, or after it was made, but before the agreement was made a rule of court, revoke his submission, a power which was frequently exercised where one of the parties had by some means ascertained that the arbitrator was unfavourably disposed towards him. Besides this, an arbitrator had no power to compel the attendance of a witness, or to administer an oath to him; and therefore if a witness on either side was

(*x*) And now by the 17 & 18 Vict. c. 125, s. 17, every agreement or submission to arbitration in writing may be made a rule of court, unless a contrary intention

appear therein.

(*y*) As to the grounds of setting aside an award, see Russell on Arbitr. 3rd ed. Chaps. ix—xi. *Re Hepper*, 36 L. J., Q. B. 97.

unwilling to give evidence, it was not safe to consent to an arbitration, and the evidence being given without the sanction of an oath, the proceeding by arbitration was less satisfactory than that before a jury. It was accordingly deemed expedient yet further to extend and improve the remedy by arbitration, and several provisions contained in the statute 3 & 4 Will. 4, c. 42, were directed to this object. By sect. 39, it was provided that if the submission contained an agreement that it should be made a rule of court, it should not be revocable without leave of the court or a judge. By sect. 40, the court or a judge was empowered to command the attendance and examination of any person, or the production of any document; and sect. 41 enabled the arbitrators or umpire to administer an oath, and has subjected a witness wilfully giving false evidence, in the matter of an arbitration, to the penalties of perjury.

Other material improvements have been made in the law of arbitrations, by the statute 17 & 18 Vict. c. 125, as well by amending the pre-existing law upon this subject (*z*), as by enabling the court or a judge to compel a reference to arbitration either before or at the time of trial, where the matter in dispute consists, wholly or in part, of items of mere account, which cannot conveniently be tried (*a*). Under the provisions first alluded to, an action commenced by one of the parties to the reference after all have agreed thereto may be stayed (*b*), where the parties cannot concur in the appointment of an arbitrator, he may be appointed upon summons by a judge (*c*); where the reference is to two arbitrators, and one party fails to appoint, the other party may appoint an arbitrator to act alone (*d*), and the award, unless when otherwise agreed or ordered, is to be made within three months, if the term for making

(*z*) Ss. 11—17.

(*a*) Ss. 3 (amended by 21 & 22
Vict. c. 74, s. 5), 6.

(*b*) S. 11.

(*c*) S. 12.

(*d*) S. 13.

it be not enlarged (*e*). The latter series of provisions (*f*) regulate the procedure, where the reference is compulsory, and *inter alia* empower the arbitrator to state his award, as to the whole or any part thereof, in the form of a special case for the opinion of the court (*g*).

(*e*) S. 15.

(*f*) Ss. 3—10.

(*g*) S. 5.

CHAPTER II.

REDRESS OF PRIVATE WRONGS BY THE OPERATION OF LAW.

THE remedies for private wrongs, which are effected by the mere operation of law, will fall within a very narrow compass: the principal are these, known as, I. Retainer, (where a creditor is made executor or administrator to his debtor). II. Set-off. III. Remitter, to which may be added, IV., the effect of the marriage of parties in certain cases.

I. If a person indebted to another makes his creditor or debtee his executor (*a*), or if such creditor obtains letters of administration (*b*) to his debtor; in these cases the law gives him a remedy for his debt, by allowing him to retain so much as will pay himself, before any other creditors whose debts are of equal degree. This is a remedy by the mere act of law, and grounded upon this reason; that the executor cannot, without an apparent absurdity, commence a suit against himself as representative of the deceased, to recover that which is due to him in his own private capacity: but, having the whole personal estate in his hands, so much as is sufficient to answer his own demand is, by operation of law, applied to that particular purpose. Else, by being made executor, he would be put in a worse condition than all the rest of the world besides. For, though a rateable payment of all the debts of the deceased, in equal degree, is clearly the most equitable method, yet as

(*a*) 1 Roll. Abr. 922; *Woodward* 127; *Bond v. Green*, 1 Brownl. 75.
v. Darcy, Plowd. 184. See Williams on Executors, 6th ed.

(*b*) *Warner v. Wainford*. Hob. pp. 971 *et seq.*

every scheme for a proportionable distribution by an executor or administrator, of the assets among all the creditors has been hitherto found to be impracticable, and productive of more mischiefs than it would remedy; so that the creditor who first commences his suit is entitled to a preference in payment; it follows, that as the executor can commence no suit, he must be paid the last of any, and of course must lose his debt, in case the estate of his testator should prove insolvent, unless he be allowed to retain it. The doctrine of retainer is therefore the necessary consequence of that other doctrine of the law, the priority of such creditor who first commences his action. But the executor shall not retain his own debt, in prejudice to those of a higher degree; for the law only puts him in the same situation, as if he had sued himself as executor, and recovered his debt; which he never could be supposed to have done, while debts of a higher nature subsisted. Neither shall one executor be allowed to retain his own debt, in prejudice to that of his co-executor in equal degree; but both shall be discharged in proportion (c). Nor shall an executor of his own wrong be permitted to retain (d), except in the case where he becomes so (e) through accepting a gift of the intestate's effects from an administrator who has obtained the grant fraudulently. Whether an executor might retain for a debt barred by the statute was formerly in some doubt; recent decisions, which may be accepted as settling the question, have established the right in this case also (f).

(c) *Chapman v. Turner*, 11 Vin. Abr. 72, tit. Exors. D. 2; *S. C.* 9 Mod. 268.

(d) *Coulter's case*, 5 Rep. 30; *S. C.* Cro. Eliz. 630.

(e) By 43 Eliz. c. 8, the statute expressly reserves the right of retainer.

(f) *Stahlschmidt v. Lett*, 1 Sm. & G. 415; *Hill v. Walker*, 4 K. &

J. 166; *Sharman v. Rudd*, 27 L. J., Ch. 844. In the analogous case of remitter, however, the rule seems to be that there is no remitter to an estate a right to which would be barred by the statute, see *post*, p. 14 n. (p), and p. 16. Upon the general law of Retainer, see *Williams on Executors, ubi sup.*, and *Stammers v. Elliot*, L. R. 3 Ch. 195.

II. Set-off is a right somewhat analogous to retainer; II. Set-off. it exists where there are cross demands between two persons. If a man has a claim for a sum of money against another and is also indebted to him, he may consider his claim to be a discharge or extinguishment of his debt, if they be equal in amount, or *pro tanto* if unequal. This rule, founded upon reason and justice, inasmuch as it prevents unnecessary multiplication of suits and much inconvenience of other kinds, seems to have been adopted originally from the Roman Law (g). "*Ideo necessaria est compensatio, quia interest nostra potius non solvere quam solutum repetere*" is the statement in the Digest (h) of its foundation.

The doctrine was not, however, voluntarily accepted by our courts of common law, and in early times its benefit could only be obtained in courts of equity where it seems to have been always recognised (i). The obviously disastrous consequences of not admitting it in the event of the bankruptcy of one of the parties led to its recognition by the legislature in that case (k). And not long afterwards the same supreme authority interfered to permit a set-off to be pleaded at law in general cases (l).

(g) This was the opinion of Sir Thomas Clarke. See *Whitaker v. Rush*, Amb. 407.

(h) Lib. xvi. tit. 2. De Compensationibus. In a comment on "*necessaria*," it is said, "*Id est cum lis possit uno iudicio definiri, scilicet per actionem et exceptionem, pluralitas seu multitudo iudiciorum non debet admitti, ut quæ incommoda sumptusque adferat; quin etiam compensationem æquitas poscere videtur, nam dolo facit qui petit quod restitutus est.*" Corp. Jur. Civ. Dion. Gothofredi, 1615.

(i) *Downam v. Matthew*, Prec. Chan. 580; 1 Ch. 499; *Anon.*, 1 Mod. 215; *Curzon v. African Co.*,

1 Vern. 121; *Chapman v. Derby*, 2 Vern. 117; *Peters v. Soame*, 2 Vern. 428; *Jeffer v. Wood*, 2 P. W. 128; *Green v. Farmer*, 4 Burr. 2220.

(k) The first statute is 4 & 5 Anne, c. 17. Subsequent Acts allowing set-off in bankruptcy are, 5 Geo. 1, c. 11; 5 Geo. 2, c. 30, s. 28; 46 Geo. 3, c. 125, s. 3; 12 & 13 Vict. c. 106, s. 172, which last regulates the law as now in force.

(l) 2 Geo. 2, c. 22, s. 12, made perpetual by 8 Geo. 2, c. 24, s. 4, and see s. 5. See also *Isberg v. Bowder*, 8 Exch. 852. A form of plea is given in Sch. B. No. 41, of the Common Law Procedure Act,

There are various rules and conditions which regulate the application of the doctrine, into which we cannot appropriately enter here at any length. They depend upon the nature of the relation existing between the parties and the character of the conflicting claims. Thus where the claims are in different rights (*m*), or where one is for unliquidated damages or for tort, the other being a common debt of fixed amount (*n*), or where the debt in respect of which set-off is claimed accrued after the commencement of the action (*o*), no set-off will be allowed, and it would seem that set-off may not be asserted in respect of a debt barred by the Statutes of Limitations (*p*).

Courts of equity, having a wider cognisance of rights and claims than courts of law, are still (*q*) sometimes

1852, and see, besides, 23 & 24 Vict. c. 126, s. 21.

(*m*) *West v. Pryce*, 2 Bing. 555; *Wood v. Smith*, 4 M. & W. 525; *Groom v. Mealey*, 2 Bing. N. C. 138; *Bishop v. Church*, 3 Atk. 691; *Whitaker v. Rush*, Amb. 407; *Chapman v. Derby*, 2 Vern. 117; *Mardall v. Thellusson*, 6 E. & B. 976; *Rees v. Watts*, 11 Exch. 410. Unless the circumstances are very special, *Freeman v. Lomas*, 9 Hare, 109; *Bousfield v. Lavford*, 1 De G. J. & S. 459. See also *Stammers v. Elliott*, L. R. 4 Eq. 675; and on appeal, 3 Ch. 195.

(*n*) *Bell v. Corry*, 8 C. B. 887; *Crompton v. Walker*, 3 E. & E. 321; *Thompson v. Redman*, 11 M. & W. 487.

(*o*) *Richards v. James*, 2 Ex. 471; and see for further illustrations the cases *Pratt v. Keith*, 33 L. J. Ch. 528; *In re Bank of Hindostan, Smith's Case*, L. R. 3 Ch. 125.

(*p*) *Chapple v. Durston*, 1 Cr. & J. 1; *Fairthorne v. Donald*, 13 M. & W. 424. This appears however

a somewhat harsh rule: in analogous cases, such as lien, the statutes are disregarded, *Spears v. Hartley*, 3 Esp. 81; *Higgins v. Scott*, 2 B. & Ad. 413; and see *Mills v. Powkes*, 5 Bing. N. C. 455. Again, V.-C. Kindersley held, in *Eduards v. Waugh* (L. R. 1 Eq. 418, overruling the M. R. in *Mason v. Broadbent*, 33 Beav. 296), that a mortgagee may retain out of moneys produced by sale of the mortgaged properties more than six years' interest, notwithstanding 3 & 4 Will. 4, c. 27, s. 42. And in the case of a legacy to a debtor whose debt is barred, it is now quite established that the executor may set off the legacy against the debt, *Courtenay v. Williams*, 3 Hare, 539; *Coates v. Coates*, 33 Beav. 249. It is to be observed that the statutes, 21 Jac. 1, c. 16, and 3 & 4 Will. 4, c. 42, only take away the remedy and not the right; the other Act, 3 & 4 Will. 4, c. 27, takes away the right also.

(*q*) *Jones v. Moore*, 4 Y. & C. 351; *Baillie v. Edwards*, 2 H. L.

resorted to for the protection afforded by the right of set-off: they, however, to a great extent observe conditions similar to those established as rules at law (*r*).

III. Remitter is where he who has the true property or *jus proprietatis* in lands, but is out of possession thereof, and hath no right to enter without recovering possession in an action, hath afterwards the freehold cast upon him by some subsequent, and of course defective, title; in this case he is remitted, or sent back by operation of law, to his ancient and more certain title (*s*). The right of entry, which he has gained by a bad title, shall be *ipso facto* annexed to his own inherent good one: and his defeasible estate shall be utterly defeated and annulled, by the instantaneous act of law, without his participation (*t*). As if A. disseises B., that is, turns him out of possession, and dies, leaving a son, C.; hereby the estate descends to C., the son of A., and B. is barred from entering thereon till he proves his right in an action (*t*): now, if afterwards C., the heir of the disseisor, makes a lease for life to D., with remainder to B. the disseisee for life, and D. dies: hereby the remainder accrues to B., the disseisee: who thus gaining a new freehold by virtue of the remainder, which is a bad title, is by act of law remitted, or in of his former and surer estate (*u*). For he hath hereby gained a new right of possession, to which the law immediately annexes his ancient right of property. And it may be remarked that

III Remitter.

Ca. 74; *Macmahon v. Burchell*, 3 Hare, 97; *Jones v. Mossop*, 3 Hare, 568.

(*r*) See the principles regulating set-off in equity stated in *Clarke v. Cort*, Cr. & Ph. 154; *Ranson v. Samuel*, *ib.* 161; *Freeman v. Lomas*, 9 Hare, 169, and illustrated in *Cavendish v. Geares*, 24 Beav. 163; *Courtenay v. Williams*, 3 Hare, 539; *Jones v. Mossop*, 3 Hare, 568;

Alvanley v. Lewis, L. J. (N. S.) Ch. 55; *In re Commercial Bank*, L. R. 2 Ch. 538; *In re Overend Gurney and Co. (Grissell's Case)*, *ib.* 528.

(*s*) Litt. s. 659. This and the following thirty-seven sections of Littleton's treatise contain a large variety of cases of remitter.

(*t*) Co. Litt. 348; Cro. Jac. 489.

(*u*) Finch. L. 194; Litt. s. 683.

this takes place whatever may be his will or intention. He is remitted *volens volens* (x).

If the subsequent estate, or right of possession, be gained by a man's own act or consent, as by immediate purchase being of full age, he shall not be remitted. For the taking such subsequent estate was his own folly, and shall be looked upon as a waiver of his prior right (y). Therefore it is to be observed, that to every remitter there are regularly these incidents; an ancient right, and a new defeasible estate of freehold in possession, uniting in one and the same person; which defeasible estate must be cast upon the rightful owner not gained by his own act: except, indeed, in the case of an infant or married woman, against whom the law will not adjudge folly (z).

The reason given by Littleton (a), why this remedy, which operates silently, and involuntarily, by the mere act of law, was allowed, is somewhat similar to that given for retainer; because otherwise he who hath right would be deprived of all remedy. For as he himself is the person in possession of the freehold, there is no other person against whom he can bring an action, to establish his prior right. And for this cause the law doth adjudge him in by remitter; that is, in such plight as if he had lawfully recovered the same land by suit. For, as Lord Bacon observes (b), the benignity of the law is such, as when, to preserve the principles and grounds of law, it depriveth a man of his remedy without his own fault, it will rather put him in a better degree and condition than in a worse. *Nam quod remedio destituitur, ipsâ re valet, si culpa absit.* But there shall be no remitter to a right which is extinguished, or for which the party has no remedy by action (c): as if it be barred by the Statute of Limitations (d): or if

(x) Litt. s. 690; Com. Dig. Remitter, B. 3; *Doe d. Daniell v. Woodroffe*, 2 H. L. 811.

(y) Co. Litt. 348, 350.

(z) Co. Litt. 349, 351, 352.

(a) S. 661.

(b) Elem. r. 9.

(c) Co. Litt. 349.

(d) See *Doe d. Daniell v. Woodroffe* 10 M. & W. 608; 15 M. & W.

under the law as it stood prior to the act abolishing fines, the issue in tail had been barred by the fine of his ancestor and the freehold was afterwards cast upon him; he was not remitted to his estate tail (*e*): for the operation of the remitter is exactly the same, after the union of the two rights, as that of a real action would have been before it. As therefore the issue in tail could not by any action have recovered his ancient estate, he could not recover it by remitter. Of course under the present law there can be no remitter to an estate tail barred by a disentailing assurance duly executed by the ancestor. Inasmuch as the possession of one coparcener, joint tenant, or tenant in common is not the possession of any other (*f*), therefore if one be remitted to any of these estates no advantage accrues to any other (*g*).

IV. Besides the remedies of retainer, remitter, and set-off, we may here mention another mode whereby a right may be extinguished by operation of law, and so in a manner a wrong may be considered as redressed. If a woman marry her creditor or debtor, in either case the debt is absolutely extinguished (*h*). The debt, however, must be one which, if existing, would be payable during the coverture, otherwise it is not extinguished; for instance, if a bond be given to a woman in contemplation of her marriage with the obligor, conditioned to pay a sum of money to her or her representatives after the obligor's death, this bond would be valid, notwithstanding the marriage (*i*).

IV. Marriage of debtor and creditor.

768; 2 H. L. Ca. 811; in which case the law concerning remitter was much discussed.

(*e*) *Anon.* Moor. 115; *Minter v. Collins*, 1 Andr. 286; *Doc d. Daniell v. Woodroffe*, *ubi sup.*

(*f*) *Culley v. Taylerson*, 11 A. & E. 1008; *Burroughs v. M'Creight*, 1 J. & L. 290; 3 & 4 Will. 4. c.

27, s. 12.

(*g*) *Doc d. Daniell v. Woodroffe*, *ubi sup.*

(*h*) Co. Litt. 264, b.

(*i*) *Cage v. Acton*, 1 Raym. 515; S. C. 1 Salk. 325, and *sub. nom.*; *Acton v. Peirce*, 2 Vern. 480; *Melbourne v. Ewart*, 5 T. R. 381.

Conclusion. And thus much for these extrajudicial remedies, as well for real as personal injuries, which are furnished or permitted by the law, where the parties are so peculiarly circumstanced, as not to make it eligible, or in some cases even possible, to apply for redress in the usual and ordinary methods to the courts of public justice.

CHAPTER III.

COURTS IN GENERAL.

THE next, and principal, object of our inquiries is ^{Redress by} redress by suit in court: wherein the act of the parties ^{suit in} and the act of law co-operate; the act of the parties being ^{court.} necessary to set the law in motion, and the process of the law being in general the only instrument by which the parties are enabled to procure a certain and adequate redress.

And here it will not be improper to observe, that although in the several cases of redress by the act of the parties mentioned in a former chapter (*a*), the law allows an extrajudicial remedy, yet that remedy is not compulsory, and does not exclude the ordinary course of justice: it is only an additional weapon put into the hands of persons in particular instances, where natural equity or the peculiar circumstances of their situation require a more expeditious remedy, than the formal process of a court of judicature can furnish. Therefore, though I may defend myself from external violence, I yet am afterwards entitled to an action of assault and battery: though I may retake my goods, if I have a fair and peaceable opportunity, this power of recaption does not debar me from my action: I may either enter on the lands, on which I have a right of entry, or may demand possession by action: I may either abate a nuisance by my own authority, or call upon the law to do it for me: I may distrain for rent,

(*a*) Chap. I.

or have an action of debt, at my own option : if I do not distrain my neighbour's cattle damage-feasant, I may compel him by action to make me a fair satisfaction for the damage done ; if a heriot be withheld from me by fraud or force, I may recover it though I never seized it. And with regard to accords and arbitrations, either of these, being in its nature merely an agreement or compromise, indisputably supposes a previous right of obtaining redress some other way ; which is given up by such agreement. And as to remedies by operation of law, those are indeed given, because no remedy can be administered by suit or action, without running into the palpable absurdity of a man's bringing an action against himself : the two cases wherein they happen being such, that the only possible legal remedy would have to be directed against the very person who seeks relief.

Otherwise, however, it is a rule, that where there is a legal right, there is a legal remedy, by suit in court or by application to a court of justice, whenever that right is invaded. And in treating of such remedy, I shall now consider the nature of courts in general ; and shall afterwards inquire as to the several species of courts, the jurisdiction of each, and the method of obtaining the redress which it affords.

A court, how
defined.

A court is defined to be a place wherein justice is judicially administered (*b*). And, as by our constitution the sole executive power of the laws is vested in the person of the sovereign, courts of justice, which are the medium by which he administers the laws, are derived from the power of the crown (*c*). For, whether created by act of parliament, or letters patent, or subsisting by prescription (the only methods by which any court of judicature can exist (*d*)), the royal consent in the two former is expressly, and in the latter is impliedly, given.

(*b*) Co. Litt. 58.

(*c*) See Bk. I. chap. 7.

(*d*) Co. Litt. 260.

In these courts the sovereign is supposed in contemplation of law to be always present; or at least is there represented by the judges, whose power is but an emanation of the prerogative.

For the more speedy and impartial administration of justice between subject and subject, the law has appointed various courts, some with a more limited, others with a more extensive jurisdiction; some constituted to inquire only, others to hear and determine; some to determine in the first instance, others upon appeal. These will be taken notice of in their respective places: and here one distinction only that runs throughout them need be noticed; *viz.* between courts of record and courts not of record. A court of record is that, whose acts and judicial proceedings are enrolled for a perpetual memorial and testimony: which rolls are called the records of the court, and are of such high and super-eminent authority, that their truth is not to be called in question. For it is a settled rule and maxim that nothing shall be averred against a record, nor shall any plea, or even proof, unless where fraud is involved, be admitted to the contrary (*e*). And if the existence of a record be denied, it shall be tried by nothing but itself: that is, upon bare inspection whether there be any such record or no; else there would be no end of disputes. But, if there appear any mistake of the clerk in making up such record, the court will direct him to amend it. All courts of record are said to be the queen's courts, in right of her crown and royal dignity (*f*), and no other court has authority to fine or imprison for a contempt; so that the very erection of a new jurisdiction with such power makes it a court of record (*g*).

As exemplifying the nature of a court not of record

(*e*) Co. Litt. 260.

(*f*) Finch. L. 231.

(*g*) *Groenvelt v. Burwell*, Salk. 200; *Grenville v. Coll. of Physi-*

cians, 12 Mod. 388. See *Inhabitants of Oldbury v. Stafford*, 1 Sid. 145.

not of record.

may be instanced the court-baron incident to a manor, where the proceedings are not enrolled or recorded; but as well their existence as the truth of the matters therein contained may, if disputed, be tried and determined by a jury.

Its consti-
tuent parts.

In every court there must be three constituent parts, the *actor*, *reus*, and *judex*: the *actor*, or plaintiff, who complains of an injury done; the *reus*, or defendant, who is called upon to make satisfaction for it; and the *judex*, or judicial power, whose duty it is to examine the truth of the fact, to determine the law arising upon that fact, and, if any injury appears to have been done, to ascertain, and by its officers to apply the remedy. It is also usual in a court of justice to have attorneys or solicitors, and advocates or counsel, as assistants.

Attornies.

An attorney at law, or a solicitor, answers to the *procurator*, or proctor, of the civilians and canonists (*h*), and is one put in the place, stead, or turn of another, to manage his matters of law. Formerly every suitor was obliged to appear in person, to prosecute or defend his suit, unless by special licence under the king's letters patent (*i*). And an idiot cannot at this day appear by attorney, but must do so in person (*k*), for he has not discretion to enable him to appoint a proper substitute. But, as in the Roman law, "*cum olim in usu fuisset, alterius nomine agi non posse, sed, quia hoc non minimam incommoditatem habebat, ceperunt homines per procuratores litigare*" (*l*), so with us, upon the same principle of convenience, it was permitted in general, by divers ancient statutes, whereof the first was statute Westm. 2, c. 10, that an attorney might be made to prosecute or defend any action in the absence of the parties to the suit. These attornies are now formed into a regular corps; they are admitted to the ex-

(*h*) Pope Boniface VIII. in 6 Decretal. l. 3, t. 16, s. 4, speaks of *procuratores* "*qui in aliquibus partibus attornati nuncupantur.*"

(*i*) F. N. B. 25.

(*k*) *Ibid.* 27.

(*l*) Inst. 4, tit. 10.

ecution of their office by the superior courts of law and equity; and are officers of the respective courts in which they are admitted to practice: and, as they have many privileges on account of their attendance there, so they are peculiarly subject to the censure and animadversion of the judges (*m*). The duty of an attorney towards his client flows from his retainer, and he is liable for gross negligence in conducting the business which he undertakes (*n*).

Of advocates, or (as we generally call them) counsel, Counsel. there are two species or degrees; barristers, and serjeants. The former are admitted, subject to regulations before noticed (*o*), by the inns of court; and are in our old books styled apprentices, *apprenticii ad legem*, having been formerly looked upon as merely learners, and not qualified to execute the full office of an advocate till they were of sixteen years' standing; at which time, according to Fortescue (*p*), they might be called to the state and degree of serjeants (*q*), or *servientes ad legem*.

From amongst members of the outer bar some are from time to time selected to be her majesty's counsel learned in the law: the two principal of whom are called her attorney, and solicitor-general. The first king's counsel, under the degree of serjeant, was sir Francis Bacon, who was made so *honoris causâ*, without either patent or fee (*r*); so that the first of the modern order (who are now the sworn

(*m*) The law relating to attorneys was consolidated by the 6 & 7 Vict. c. 73, and has been amended by stats. 7 & 8 Vict. c. 86; 14 & 15 Vict. c. 88; 23 & 24 Vict. c. 127.

(*n*) *Fray v. Voules*, 1 E. & E. 839; *Prestwich v. Poley*, 18 C. B., N. S. 806; *Chown v. Parrott*, 14 C. B., N. S. 74.

(*o*) *Ante*, vol. i. App.

(*p*) De Leg. c. 50.

(*q*) As to which see the late Mr. Serjeant Manning's learned work,

entitled "*Serviens ad Legem*." By custom the judges of the courts of Westminster are always admitted to the degree of the coif, before they are advanced to the bench; the origin of which was probably to qualify the puisné barons of the exchequer to become justices of assize, according to the exigence of the statute 14 Edw. 3, c. 116. Fortesc. c. 50.

(*r*) See his Letters, 256.

servants of the crown, with a nominal standing salary) seems to have been sir Francis North, afterwards Lord Keeper of the Great Seal to King Charles II. (s). These queen's counsel answer, in some measure, to the advocates of the revenue, *advocati fisci*, among the Romans. For they must not be employed in any cause against the crown without special licence: in which restriction they agree with the advocates of the fisc (t): but in the imperial law the prohibition was carried still further, and perhaps was more for the dignity of the sovereign; for, excepting some peculiar causes, the fiscal advocates were not permitted to be at all concerned in private suits between subject and subject (u). A custom has for many years prevailed of granting letters patent of precedence to such barristers, as the crown thinks proper to honour with that mark of distinction: whereby they are entitled to such rank and pre-audience as are assigned in their respective patents. These, as well as the attorney and solicitor-general (v), rank promiscuously with the king's counsel, and together with them sit within the bar of the respective courts; but receive no salaries, and are not sworn; and therefore are at liberty to be retained in causes against the crown. And all other serjeants and barristers indiscriminately may take upon themselves the protection and defence of suitors, who are therefore called their clients, as were the dependants upon the ancient Roman orators. Those indeed practised gratis, for honour merely, or at most for the sake of gaining influence: and so likewise it is established with us, that a counsel can maintain no action for his fees; which are given, not as *locatio vel conductio*, but as *quiddam honorarium* (x); not as a salary

(s) See his life by Roger North, 37; Manning's *Serviens ad Legem*, 209, 210.

(t) Cod. 2, 9, 1.

(u) *Ibid.* 2, 7, 13.

(v) Seld. Tit. Hon. 1, 6, 7,

(x) *Kennedy v. Brown*, 13 C. B., N. S. 677; *Broun v. Kennedy*, 33 L. J., Ch. 71, 342; *Swinfen v. Lord Chelmsford*, 5 H. & N. 918.

or hire, but as a mere gratuity, which a counsellor cannot demand without doing wrong to his reputation (*y*); as is also laid down with regard to advocates in the civil law (*z*), whose *honorarium* was directed by a decree of the senate not to exceed in any case ten thousand sesterces, or about 80*l.* of English money (*a*).

A counsel accordingly is to be considered not as making a contract with his client, which he is incapacitated from doing (*b*), but as taking upon himself an office or duty in the proper discharge of which not merely his client, but the court in which the duty is to be performed, and the public at large have an interest. The general conduct of, and control over, the cause are necessarily left to counsel, and he has complete authority over the suit, the mode of conducting it, and all that is incident to it; but not over matters collateral thereto (*c*). Moreover, in order to encourage due freedom of speech in the lawful defence of their clients, and at the same time to give a check to the unseemly licentiousness of prostitute and illiberal men (a few of whom may sometimes insinuate themselves even into the most honourable professions), it has been held that a counsel is not answerable for any matter by him spoken, relative to the cause in hand, and suggested in his client's instructions; although it should reflect upon the reputation of another, and even prove absolutely groundless: but if he maliciously mentions an untruth of his own invention, not pertinent to the cause, he may be liable to an action at suit of the party injured (*d*).

(*y*) See judgm. *Kennedy v. Broun*, *supra*.

(*z*) Dig. 11, 6, 1.

(*a*) Tac. Ann. 1, 11, 7.

(*b*) Judgm. *Kennedy v. Broun*, 13 C. B., N. S. 736.

(*c*) *Swinfen v. Lord Chelmsford*, 5 H. & N. 890; *Strauss v. Francis*,

1 L. R., Q. B. 379.

(*d*) *Hodgson v. Scarlett*, 1 B. & Ald. 232. So, if the counsel intentionally did a wrong or acted with fraud or trickery, he might incur liability; Judgm. 5 H. & N. 919.

Having thus briefly adverted to courts in general, we are next to consider the several species of courts by which justice is civilly administered in this country—the jurisdiction of each respectively, and the procedure appropriated therein for the redress of grievances.

CHAPTER IV.

THE COURT OF CHANCERY.

THE name of chancery, *cancellaria*, and of the judge who presides there, the Lord Chancellor, or *Cancellarius*, is derived, according to sir Edward Coke, and other ancient authorities (*a*), from *cancello*, because the highest exercise of his office is to cancel the king's letters patent when granted contrary to law, a patent or other record being vacated by drawing cross lines lattice-wise (*cancelli*, or cross bars) across it (*b*).

Chancery.
Derivation
of the word.

The office and name of chancellor (however derived) was certainly known to the Roman emperors, with whom it originally seems to have signified a chief scribe or secretary, who was afterwards an officer; to whose functions there were gradually added several judicial powers, together with a general superintendency over the other officers of the prince.

Office of
Lord Chan-
cellor, and
its history.

The Roman Church adopted, amongst other accessories of imperial state, this office, and hence every bishop has to this day his chancellor, the principal judge of his consistory court. When the modern kingdoms of Europe were established upon the ruins of the empire, almost every state preserved its chancellor, but the jurisdictions and dignities varied in the different states according to their several constitutions. In all of them he seems to have had the supervision of charters, letters, and such other public instruments of the crown as were authenti-

(*a*) 4 Inst. 88; Lambard Archeion, 46.

(*b*) See also Gibb. Decl. & Fall.

ii. 99; and 1 Campb. Lives of the Chancellors, ii. as to the various derivations ascribed to the name.

cated in the most solemn manner; when, therefore, the use of seals was adopted, in or about the time of Edward the Confessor (*c*), the custody of the king's great seal was naturally entrusted to the chancellor, and with him it has ever since remained (*d*). In the present day, the office of Lord Chancellor is created by the mere delivery of the great seal into his custody; he thereby becomes, without writ or patent, an officer of the greatest weight and power of any now subsisting in the kingdom, and superior in point of precedency to every temporal lord, except the king's sons, brothers, nephews, and uncles (*e*). He is invariably made a privy councillor, if not so previously (*f*); he is *virtute officii* prolocutor, or mouthpiece of the House of Lords, whether a peer or not (*g*), presiding as well over its legislative as its judicial sittings. To him belongs the appointment of all justices of the peace throughout the kingdom.

Being, in early times, usually an ecclesiastic (for none else were then capable of an office involving much knowledge of letters), and presiding over the royal chapel (*h*), he became, and is still, in a legal point of view, keeper of the king's conscience. He is also visitor, in right of the king, of all hospitals and colleges of the king's foundation. He also exercises the right of patronage of all

(*c*) See *ante*, vol. ii.

(*d*) It used to be said, that one Rembaldus who was called chancellor of Edward the Confessor, was the first in England who received that appellation (Ellesmere, Office of Chancellor, p. 12); but duties analogous to those of Edward's chancellor were certainly performed by a great officer or secretary of the king, whether called chancellor or not, in very much earlier times. See 1 Lord Campbell's Lives of the Chancellors, p. 3.

(*e*) Stat. 31 Hen. 8, c. 10.

(*f*) Selden (Office of Lord Chancellor, § 3) says that he is a privy councillor *virtute officii*; but see 1 Campb. Lives of the Chancellors, p. 16.

(*g*) Lord Ellesmere's Office of Lord Chancellor. Gilb. w. 42. If the lord chancellor be not a peer, he, although still president of the House of Lords, is not entitled to address the house or vote.

(*h*) Madox, Hist. of Exch. 42; 1 Campbell's Lives of the Chancellors, 4.

livings of the king that are of small value: this patronage, in early times, extended to all of the king's livings whose annual value was 20 marks or under, and was chiefly exercised in favour of the clerks in chancery, who were usually ecclesiastics (*i*): afterwards, the right of presentation, without any restriction, was assumed by the chancellors, and livings up to the value of 20*l*. in the king's book (*j*) were included in this right, which has continued to the present day; the livings being in fact now looked upon and dealt with, even by the legislature, as if the advowsons were vested in the Lord Chancellor as a corporation.

The Lord Chancellor is, by the jurisdiction inherent to his office, the general guardian of all infants, idiots, and lunatics (*k*), and has the general superintendence of all charitable foundations (*l*). The duties arising from this position of guardianship and superintendence are now shared by other judges, and, moreover, have, by recent legislature, been lessened by the establishment of other functionaries (*m*).

(*i*) See Christian's note to his edition of Blackstone's Commentaries, vol. iii. p. 48, n. 6. In order to make provision for the augmentation of the value of the chancellor's livings, an act has been recently passed to authorise the lord chancellor to sell the advowsons of certain livings, the price being applied in increasing their value. See the Lord Chancellor's Augmentation Act, 26 & 27 Vict. c. 120, under which a large number of the very small livings, the advowsons of which were vested in the lord chancellor, have passed into private hands.

(*j*) *I. e.*, the valuation made in the time of Henry VIII., under 26 Hen. 8, c. 3.

(*k*) A warrant under the sign manual committing the care of idiots and lunatics to the chancellor is usually given to him on his receiving the great seal, but it would seem that the jurisdiction is inherent in the office. See Campbell's Lives, 15. Some further information on the custody of idiots and lunatics and their property will be found in the next chapter.

(*l*) By 52 Geo. 3, c. 101, summary means for taking advantage of the control of the Court of Chancery have been provided. See *post*, p. 81.

(*m*) The Charity Commissioners, under 16 & 17 Vict. c. 137, now exercise a large control over endowed charities. As to what are

The Court of Chancery a court of record for letters patent, &c.

Officina breviarum.

In addition to all these functions, the Lord Chancellor is the chief judge in the Court of Chancery, wherein there are two courts; the one ordinary, being a court of common law, the other extraordinary, being a court of equity (*n*). Though the Court of Chancery, in the most ancient times, was a court of record, for letters patent under the great seal were, and are always, recorded in the court (*o*), it was not originally a court where justice was administered; but from the very earliest times, out of the Court of Chancery, which has from this circumstance been called *officina breviarum* and *officina justitiæ*, there have issued writs under the great seal directed to the king's justices or the sheriffs to give such remedy as the occasion required (*p*). When the circumstances of a case were similar to others that had preceded it, old established forms were, by the rule of the court, adopted; but when new cases arose, which could not be dealt with under any existing form of action, in order to prevent the harsh or imperfect judgment which might otherwise ensue, a new form of writ was sought for.

This was the custom not only among our Saxon ancestors before the institution of the *Aula Regia* (*q*), but also

endowed charities within their jurisdiction, see *Governors of the Charity for Relief of Clergymen's Widows v. Sutton*, 27 Beav. 651.

(*n*) In old times often called the Latin and the English sides of the court, from the languages employed in the pleadings respectively used. The bill in the equity side long continued to be called the English bill.

(*o*) "A patent is a record in chancery upon which a *scire facias* may issue, and it is a sufficient record whereon to found it." *R. v. Sir O. Butler*, 3 Lev. 223; Bac. Abr. tit. "Sci. Fa." C. 138; *Byrner v. The Queen*, 9 Q. B. 523. Letters patent

for invention, though issued out of chancery as being under the great seal, have long been treated in a different manner from other letters patent. The earliest statute regulating their grant is 18 Hen. 6, c. 1. It has been followed by a long series of statutes; the present general statute is 15 & 16 Viet. c. 83.

(*p*) Mirror of Justice, 176, ed. 1646.

(*q*) *Nemo ad regem appellet pro aliqua lite, nisi jus domi consequi non possit. Si jus nimis screrum sit, alleviatio deinde queratur apud regem.* LL. Edg. c. 2. In very early times, the mode in which the

after its dissolution, in the reign of Edward I. (*r*), and, perhaps, during its continuance in that of Henry II. (*s*).

The chief judicial employment of the chancellor in these very early times, therefore, must have been in devising, with the assistance of his clerks, new writs directed to the courts of common law, to give remedy in cases where none was before administered (*t*). To quicken the diligence of the clerks in chancery, who were supposed to be too much attached to ancient precedents, it is provided by the statute of Westminster the second (13 Edw. 1, c. 24), that "whenever from thenceforth a writ shall be found in the chancery, and in a like case falling under the same right, and requiring like remedy, no precedent of a writ can be produced, the clerks in chancery shall agree in forming a new one: and if they cannot agree, it shall be adjourned to the next parliament, where a writ shall be framed by consent of the learned in the law (*u*), lest it happen for the future that the court of our lord the

Statute of
Westmin-
ster 2.

relief was granted was by plaint to the king, who, with the assistance of his chancellor or secretary, framed a writ or letters to the judges: the most ancient form of such writ being as follows:—"Rex, &c. (to the judge.) *Questus est nobis A. quod B., &c., et ideo tibi (vices nostras in hac parte committentes) præcipimus quod causam illam audias et legitimo fine decidas.*" Mirror of Justice, p. 8.

(*r*) Lambard Archeion, 59.

(*s*) Joannes Sarisburiensis (who died A.D. 1182, 26 Hen. 2), speaking of the chancellor's office in the verses prefixed to his *Polycraticon*, has these lines:—

"*Hic est qui leges regni cancellat iniquas,*

Et mandata pii principis æqua facit."

(*t*) See Chief Baron Gilbert's reasons for the institution of the *officina brevium*, History and Practice, p. 10.

(*u*) *I. e.*, the clerks or masters in chancery, of whom Fleta, lib. ii. ch. 12, says, "*Cui (cancellario) associantur clerici honesti et circumspecti Domino Regi jurati qui in legibus et consuetudinibus Anglicanis notitiam habent pleniorum quorum officium est supplicationes et querelas conquerentium audire et eis super qualitatibus injuriarum ostensurum debitum remedium exhiberi per brevia Regis;*" and elsewhere, "*Episcopi autem collaterales et socii cancellarii esse dicuntur præceptores eo quod brevia causis examinatis remedialia fieri præcipiant et hoc quandoque tam sive denariis ad opus Regis tam sive fine,*" &c.

king be deficient in doing justice to the suitors : ” and the statute gives a variety of new precedents of writs, some of them for cases previously unprovided for. Thus is accounted for the number of writs of trespass on the case to be met with in the ancient register, whereby the suitor had relief according to the exigency, and adapted to the special circumstances and justice of his case (*x*).

In process of time, however, the chancellor came to do more than furnish the first ingredients of judicial action; he always sat as a member of the *Aula Regia*, and was accustomed generally to attend the king in person for the purpose, amongst other things, of giving him advice; indeed, he was doubtless the principal legal adviser on all occasions. It was natural, therefore, that he should early take cognizance of some legal matters, and especially those connected with rights depending upon the king's grants, since he, being the holder of the great seal, was the officer through whom they had been obtained. Thus arose the ancient common law jurisdiction of the chancellor. It is not possible to fix with exactness the time when it may be said first to have been completely established, but its authority is recognised in very early times (*y*).

Common
law jurisdiction
of the
court.

As a court of justice, it has now almost reached a fossil state, the only matters which for many years have been brought before it judicially being a few suits relating to patents for invention, but its ancient jurisdiction was to hold plea upon a *scire facias* (*z*) to repeal and cancel the

(*x*) Lambard Archeion, ed. 1635, p. 61. A discretion as to issuing a new form of writ has been called into exercise in times much more recent than that of Edward I. See *The Rioters' Case*, 1 Vern. 175.

(*y*) Lord Campbell supposes that the chancellor, during the existence of the *Aula Regia*, practically decided questions similar to those which

were afterwards recognised as coming within his common law jurisdiction, by that court referring such questions for his opinion; and he concludes that when the *Aula Regia* was broken up, the chancellor assumed the jurisdiction, and so established a separate court. *Lives of the Chancellors*, p. 6.

(*z*) The writ is *scire facias*, be-

king's letters patent of all kinds when made against law, or upon untrue suggestions (*a*), to hold plea of petitions of right (*b*), *monstrans de droit*, traverses of offices found upon inquisition of escheated lands or in lunacies (*c*), and the like, or when the king has been advised to do any act, or has been put in possession of lands or goods in prejudice of a subject's right (*d*).

Much of this jurisdiction of the chancellor seems but natural, because, since the king can never be supposed to do any wrong, if any error be proved to have arisen whereby a subject has suffered, the law assumes that, on due proof of it, he will give immediate redress, and a conscientious task like this would, of course, be performed by the chancellor, the keeper of his conscience.

The jurisdiction of the court extended over all personal actions where any officer or minister of the court was a party, over partitions (by *scire facias*) of lands in coparcenary (*e*), and, whilst military tenures existed, over claims for dower where any ward of the court was concerned in interest (*f*). It afterwards retained jurisdiction in cases relating to tithes of forest land, where granted by the king, and claimed by a stranger against the grantee of the crown (*g*), and over executions upon sta-

cause, as above stated, a patent is a record in chancery. The practice of issuing the same writ in similar cases, returnable in the King's Bench, seems to have first been established in Queen Anne's reign. *Brewster v. Wells*, 6 Mod. 230.

(*a*) Similar suits were afterwards sometimes instituted on the English side. See *Saucy v. Vernon*, 1 Vern. 277, 370; and *Attorney-General v. Corporation of London*, 8 Beav. 270; 1 H. L. C. 440; 12 Beav. 8.

(*b*) Rastell's Entries, 461 a. (*a*

petition of right under 7 & 8 Hen. 8.)

(*c*) Yearbooks, 4 Edw. 4, 29 a.; 13 Edw. 4, 8 a.; 1 Hen. 7, 14 a. See *In re Ann Parry*, 35 L. J. Ch. 651; *In re Kane*, *ib.* n.

(*d*) 4 Rep. 54.

(*e*) Co. Lit. 171; Fitz. Nat. Brevium, 62. The writ of partition formerly issuing out of chancery is now abolished, 3 & 4 Will. 4, c. 27, s. 36.

(*f*) Bro. Abr. tit. Dower, 66; Moor, 565.

(*g*) Bro. Abr. tit. Dismes., 10.

Ancient
practice of
the Court.

tutes or recognisances in the nature of statutes, by the statute 23 Hen. VIII., c. 6 (*h*).

The proceedings in a suit in the common law court, when it was more used than is now the case, were not dissimilar to common law actions elsewhere. If, however, any cause came to issue, that is, if any fact were disputed between the parties, the chancellor having no power to summon a jury, could not try it (*i*), he then must deliver the record or a transcript of the record, *propria manu*, into the Court of King's Bench, where it could be tried by the country, and judgment given thereon (*k*).

When judgment was given in chancery upon demurrer or the like, a writ of error in the nature of an appeal lay out of this ordinary court into the King's Bench (*l*). This right of appeal has been so little exercised, however, that Sir W. Blackstone said that he could find no

(*h*) 2 Rol. Abr. 469.

(*i*) The recent Act, 21 & 22 Vict. c. 27, s. 3, gives the Court of Chancery power to summon a jury. That Act, though probably not intended to affect procedure in the Petty Bag Office, still, is not in terms confined to the equity side of the court, and would therefore, seemingly, enable a suit in the Petty Bag Office to be completely tried there. By the Chancery Regulation Act, 1862 (25 & 26 Vict. c. 42) it is made obligatory upon the court to decide questions of fact (s. 1), unless it can be more conveniently tried elsewhere (s. 2). *Quære*, as to the effect of this upon a suit in the Petty Bag Office.

(*k*) Cro. Jac. 12; Latch. 112. There has been recently a case of revocation of letters patent for an invention, initiated by *scire facias* in the Petty Bag Office, *Bynner v. The Queen*, 9 Q. B. 523, in which

some points of practice were considered, but *quære* whether they are still the law.

(*l*) This is the opinion of Sir W. Blackstone (citing Yearbook, 18 Edw. 3, 25; 17 Ass. 24; 29 Ass. 47; Dyer, 315; 1 Roll. Abr. 287; 4 Inst. 80,) who remarks that a contrary opinion given by Lord Keeper North, in *R. v. Cary*, 1 Vern. 131, Eq. Ca. Ab. 129, pl. 9, *S. C.*, was not well considered. In *Foxwith v. Tremain*, 1 Vent. 162, one of the points resolved by the Court of King's Bench was that a writ of error did lie out of the Petty Bag into B. R. on an error in fact. See also *Bynner v. The Queen*, 9 Q. B. 523. Mr. Macqueen however, in his learned work on the Appellate Jurisdiction of the House of Lords (p. 369), contends that the only appeal is to the House of Lords.

trace of a writ of error being actually brought since the 14th year of Queen Elizabeth, A.D. 1572.

The proceedings in this court as a court of justice have, even in these few suits which we have mentioned, been long confined to the formal proceedings, such as the pleadings, the substantial trial of the merits being in the Court of Queen's Bench (*m*).

There have always been two branches of this common law court, one called the Court of the Hanaper, the other the Court of the Petty Bag. In the former, writs relating to the business of the subject, and the returns to them, were kept according to the simplicity of ancient times, in a hamper (*in hanaperio*). In the latter, those relating to matters wherein the crown was immediately or mediately concerned, were preserved in a little bag. The distinction between the two branches still exists, though the Petty Bag is the branch in which, for obvious reasons, most vitality remains. From it issue writs of what may be called a ministerial nature, such, for instance, as writs of election issued on calling a new parliament, writs of *congé d'élire* for the appointment of bishops and archbishops. In the Petty Bag Office, as a court of record, are kept the records of an endless variety of proceedings, not to be here enumerated; the above examples are sufficient illustrations of its present duties. We may add, however, the inrolment in chancery of deeds, such as disentailing deeds, which forms part of the duties of the common law side of the court. The practice and duties of the officers in the Petty Bag Office, and of the Inrolment Office have recently been regulated by the legislature (*n*).

Courts of
the Hanaper
and of the
Petty Bag.

The Extraordinary Court, or Court of Equity, has now become the court of the greater judicial consequence, and this in such a marked degree that many well-informed

The Extra-
ordinary
Court, or
Court of
Equity.

(*m*) But see the doubt suggested in a former note as to whether this is now the case.

(*n*) 11 & 12 Vict. c. 84, amended

by 12 & 13 Vict. c. 109. These acts do not specifically mention the Hanaper office.

persons are hardly, if at all, aware that the Court of Chancery possesses any judicial or administrative functions other than its equitable ones. Recent legislation has so far modified the practice, and added to the duties of the equitable side of the court, that the business transacted by it equals in extent that of the common law courts.

The distinction between law and equity, as administered in different courts in England, is not at present known, and seems not to have ever been known in other countries (*o*), though the difference of one from the other, when administered by the same tribunal, was perfectly familiar to the Romans (*p*), the *jus prætorium*, or discretion of the prætor, being distinct from the *leges* or standing laws (*q*); but the power of both centred in one and the same magistrate, who was equally entrusted to pronounce the rule of law, and to apply it to particular cases by the principles of equity.

With us, too, the *Aula Regia*, presided over by the chief justiciar, which was the supreme court of judicature, and in which all cases of importance were tried, undoubtedly administered equal justice according to the rule of both law and equity, or either, as the case might require. When this court was broken up, though there was no formal establishment of a court of equity, yet it is probable that some desire for freedom from the trammels of strict legal procedure would often be felt, which desire

(*o*) The Council of Conscience, instituted by John III. of Portugal to review the sentences of all inferior courts, and moderate them by equity (Mod. Un. Hist. xxii. 237), seems to have been rather a court of appeal than a court of distinct jurisdiction.

(*p*) Thus too the Parliament of Paris, the Court of Session in Scotland, and every other jurisdiction in Europe of which we have any

tolerable account, found all their decisions as well upon principles of equity as those of positive law. (Lord Kames' Hist. Law Tracts, i. 325, 330; Princ. of Equity, 44.)

(*q*) Thus Cicero: — "*Jam illis promissis non esse standum, quis non videt, quæ coactus quis metu et decipit dolo promiserit! quæ quidem plerumque jure prætorio liberantur, nonnulla legibus.*" Offic. l. i.

would scarcely be disregarded. Still, though Bracton mentions equity as a thing contrasted to strict law (*q*), neither that writer nor Glanvil, nor the author of Fleta, nor even Britton (who wrote under the auspices, and in the name of Edward I., treating particularly of courts and their several jurisdictions), mentions anything about the chancellor's equitable jurisdiction.

Probably it was with the view of satisfying this desire that the statute of Westminster the Second was passed, which, by the ready issue of suitable writs, and with a little elasticity on the part of the judges, might probably have answered every purpose; indeed, opinions to this effect have been expressed by eminent judges (*r*). The only real want which might then have remained unsatisfied would have been that of obtaining discovery upon oath from the defendant (*s*).

It seems, however, that notwithstanding the varied forms of actions so devised, and the means afforded for further developement, courts of law, through a too rigorous adherence to established forms, and the letter rather than the spirit of law, still fell short of administering that complete relief which a natural sense of justice seemed to require. No satisfactory reason can be given why this should have been the case; certainly in modern times courts of law do not exhibit the same narrowness of spirit, and they have long rejected some of the old rigid rules: still, they have, naturally, been unable in many instances entirely to disregard the authority of ancient precedents, and it is but very recently that they have

(*q*) 1. 2, c. 7, fol. 23.

(*r*) "*Le subpoena ne serroit my cy souventement use come il est ore, si nous attendomus tiels actions sur les cases et mainteinomus le jurisdiction de ceo court et d'auter courts.*" Per Fairfax, a learned judge of Edward the Fourth's time. See Yearbook, 21 Edw. 4, 23.

(*s*) This important requisite for the attainment of justice might have been provided by the legislature in common law courts somewhat before the time (1854) when it was actually furnished. (See Common Law Procedure Act, 1854, s. 51.)

received any adequate aid from the legislature. But, whatever may have been the reason, a court of equity was found to be a necessity, if complete justice was to be obtained.

An important influence towards its establishment came into operation, when in the 14th century (*t*) there grew up new doctrines concerning the holding and enjoyment of property, separating the legal title from the right to the beneficial enjoyment of it, in imitation to some extent of the usufructus of Roman law, though arising out of causes peculiar to the age. With the growth of these doctrines there arose a necessity or desire for the judicial recognition of trusts or uses, as they were commonly called (*u*). The device of one person having the legal dominion over property, but bound to allow another to have the full benefit of it, was found to meet and overcome several obstacles which the law had imposed upon the disposition of landed property. Of these, perhaps, the most notable was the law of mortmain, prohibiting lands from being given for religious purposes. Ecclesiastical chancellors, therefore, readily sanctioned the plan of avoiding these statutes, by vesting the legal estate of lands in persons to the use of the religious houses, and then, by binding the conscience of the legal owner to give effect to the use. And since the jurisdiction to enforce this obligation was refused by court of law (*v*), it was assumed by the Court of Chancery. The invention of the writ of subpœna, returnable only in the Court of Chancery, by which the feoffee to uses was made account-

(*t*) 1 Sand. Uses, 12.

(*u*) It has been commonly thought that the jurisdiction over trusts was one of the principal causes of the equitable jurisdiction being assumed by the Court of Chancery. Lord Campbell, however, gives reasons for believing that it did not play so important a part in this matter as was supposed. Still it must have

had much to do with the determination with which the chancellors adhered to their power when once assumed. See Lord Campbell's *Lives of the Chancellors*, p. 10.

(*v*) Not, however, without some occasional wavering. See *Jeron v. Bush*, 1 Vern. 349, and note (3) to that case.

able to his *cestui que use* is ascribed to the "subtilty" of John de Waltham, Bishop of Salisbury, and chancellor to Richard II. (x). This writ, requiring the defendant to appear to and answer a bill of complaint in the Court of Chancery, continued from that time until very recently, to be the foundation of a chancery suit. It was originally framed under a strained construction of the above-quoted statute of Westminster the Second; but the process having been found to answer well the ends of those who used it, the practice of issuing it was soon extended to many cases, even to some which were properly determinable at common law; a false and fictitious suggestion being made in the bill that common law furnished no relief. To remedy this, which was thought to be an evil, the statute 17 Rich. 2, c. 6, was passed, by which the chancellor was directed to award damages to the party unjustly vexed by such a proceeding. It may be noticed that the clergy so early as the reign of King Stephen had attempted to turn their ecclesiastical courts into courts of equity, by entertaining suits, *pro læsione fidei*, as a spiritual offence against conscience, in case of non-payment of debts or breach of civil contract (y), and these attempts were continued till they were checked by the Constitution of Clarendon (z), which declared that "*placita de debitis quæ fide interposita debentur, vel absque interpositione fidei sint*

(x) Rot. Parl. 3 Hen. 5, n. 46; Spelm. Glos. 106; 1 Lev. 242; 1 Roll. Abr. 371. John de Waltham was master of the rolls, but had the great seal entrusted to him on several occasions. Rymer, vii. 362, 381, 496, 510. From the invention of trusts and the exclusive control which the court of equity took of them, there naturally grew up that vast administrative business by which family estates and property are preserved and managed under the direction of the court,

which now occupies so large a portion of its attention. The policy of recent legislation is to continually add to this part of the court's duties, the exercise of judicial discretion being clearly most beneficial to those persons who occupy the position of guardians, and those (such as infants) who are entitled to the enjoyment, yet incapable of the management of property.

(y) Lord Lytt. Hen. 2, b. 3, p. 361.

(z) 10 Hen. 2, c. 15; Speed, 458.

in justitiâ regis." Yet even after this enactment the spiritual courts continued to grasp at the same authority (*a*) down to so late a time as the fifteenth century (*b*), till finally prohibited by the unanimous consent of all the judges.

Jurisdiction
assumed by
the Chan-
cellors.

The fact is undoubted, and the reasons are sufficiently apparent, that the chancellors clung to, and sought to extend, the jurisdiction which they had acquired, and they succeeded in doing this, notwithstanding that repeated efforts were made to put an end to their power. We find that in the reigns of Henry IV. and Henry V. (*c*), there were several petitions presented by the commons to the king, urging the suppression of the writ of subpœna as a novelty contrary to the form of the common law, whereby, as they declared, no plea could be determined unless by examination and oath of the parties, according to the form of the civil law, and the law of holy church, but in subversion of the common law. Henry IV., feeling perhaps not too secure on his throne, evaded these requisitions, or even, to some extent, acceded to them (*d*); but Henry V. gave a decided negative to the application, and the process by writ of subpœna and bill in chancery then became,

(*a*) In 4 Hen. 3, suits in court christian *pro læsione fidei* upon temporal contracts were adjudged to be contrary to law. (Fitzh. Abr. tit. Prohibition, 15.) But in the statute or writ of *circumspecte agatis*, supposed by some to have issued 13 Edw. 1, but more probably (3 Pryn. Rec. 336) 9 Edw. 2, suits *pro læsione fidei* were allowed to the ecclesiastical courts, according to some ancient copies, (Berthelet, Stat. Antiq. Lond. 1531, 90, b.; 3 Pryn. Rec. 336), and the common English translation of that statute, though in Lyndewode's copy (Prov. l. 2, t. 2), and in the

Cotton MS. (Claud. D. 2), that clause is omitted.

(*b*) Yearbook, 2 Hen. 4, 10; 11 Hen. 4, 88; 38 Hen. 6, 29; 20 Edw. 4, 10.

(*c*) Rot. Parl. 2 Hen. 4, 69; 4 Hen. 4, 78 & 110; 3 Hen. 5, 46, cited in Prynne's Abridg. of Cotton's Records, 410, 422, 424, 548. See 4 Inst. 83; 1 Roll. Abr. 370, 371, 372.

(*d*) See 4 Hen. 4, c. 23, by which judgments at law were made irrevocable, except by attain or writ of error, and not to be impeached in equity. Doctor and Student, Dial. 1, c. 18.

and continued to be, until the year 1852 (*e*), the daily practice of the court, its application being constantly extended.

Equitable jurisdiction of some kind was, no doubt, exercised before the time of John de Waltham's writ, but it seems to have been the first instance of process issued out of the Court of Chancery without special commission from the king, or special authority derived from parliament (*f*), for the purpose of enforcing equitable rights by the authority of that court alone. Thus was established, in addition to his ordinary power (*potentia ordinata*), the extraordinary or absolute power (*potentia absoluta*) (*g*) of the chancellor, in the exercise of which he disregarded the ordinary rules of procedure in courts of law (*h*), adopted such means, by examination on oath of the parties or otherwise, as seemed best calculated to discover the truth, and enforced obedience to his decrees by imprisonment. The chancellors did not, and probably felt that they could not, assume all the powers which were exercised by courts of law; such, for instance, as summoning a jury to determine questions of fact, and this became one of the principal defects of the court, which have recently been rectified. In its judgment, the Court of Chancery, whilst adhering to those rules of law which were consonant with principles of equity, boldly overruled those rules or maxims of almost absurd and fanciful rigour which had been laid down and pertinaciously adhered to by judges, notwith-

(*e*) See 15 & 16 Vict. c. 86, s. 2.

(*f*) Lord Campbell gives an instance, taken from the Close Rolls, of a suit for specific performance in 40 Edw. 3, where the plaintiff petitioned the king in parliament, who caused the defendant to come before the chancellor, the treasurer, the justices, and other sages; and he states that the records of the court of chancery contain other instances still earlier of the exercise

of equitable jurisdiction, though none so early of compelling the execution of a trust. *Lives of Chancellors*, 8 n.

(*g*) *Ellesmere*, 44.

(*h*) Though the procedure which grew up in chancery was far from being free from reproach. See, for instance, the table of processes to compel appearance and answer exhibited in page 152 of the Report of the Chancery Commission, 1826.

standing that through the accidents or necessities of social life they in fact often worked great injustice (*i*).

The relief given, as compared with that now obtained, did not, however, for a long time extend very far; for in the ancient treatise entitled *Diversité des courtes*, or Diversity of courts and their jurisdictions (*k*), written by an unknown author in the time of King Henry the Eighth, we have a catalogue of the matters of conscience then cognisable in chancery, and these fall within a very short range (*l*). No regular judicial system or rules of equity at that time prevailed in the court. A suitor who thought himself aggrieved could but obtain a desultory and uncertain remedy according to the private opinion of the chancellor (*m*), generally, and as we have already remarked in very early times always, an ecclesiastic, sometimes, though rarely, a statesman, scarcely ever a lawyer. From the times of the chief justices Thorpe and Knyvet, successively chancellors to King Edward III. in 1372 and

(*i*) Such as the rule that a debt or other chose in action shall not be assigned: notwithstanding what Lord Coke says—"The great wisdom and policy of the sages and founders of our law have provided that no possibility, right, title, nor thing in action shall be granted or assigned to strangers, for that would be the occasion of multiplying of contentions and suits, of great oppression to the people, and chiefly of terre tenants, and the subversion of the due and equal execution of justice." *Lampet's Case*, 10 Rep. 48. See, as to the present policy of the legislature, 30 & 31 Vict. c. 144, which gives to assignees of a policy of life assurance the right to sue at law in their own name; and the similar act relating to marine insurances, 31 & 32 Vict. c. 86.

(*k*) See title-page of English edi-

tion, 1646.

(*l*) Tit. Chancery, p. 296, Rastell's edit. 1534; p. 293, English edit. 1646.

(*m*) "Equity is a roguish thing. For *law*, we have a measure, and know what to trust to; *equity* is according to the conscience of him that is chancellor; and as that is larger or narrower, so is equity. 'Tis all one as if they should make the standard for the measure a chancellor's foot. What an uncertain measure would this be! One chancellor has a long foot, another a short foot, a third an indifferent foot. It is the same thing with the chancellor's conscience.'" (Selden's Table Talk, tit. Equity.) This, though scarcely just at the time it was written, might with more truth be applied to the early exercise of the court's jurisdiction.

1373, till the promotion of Sir Thomas More by Henry the Eighth in 1530, no lawyer sat in the Court of Chancery (*n*). After this time the great seal was indiscriminately committed to the custody of lawyers, courtiers (*o*), and churchmen (*p*), according as the convenience of the moment, or the caprice of the sovereign, might require, until, in 1592, Serjeant Puckering was made lord keeper, from which time to the present the Court of Chancery has always been filled by a lawyer; except that during the interval from 1621 to 1625 the seal was entrusted to Dr. Williams, then Dean of Westminster, but afterwards Bishop of Lincoln, who had been chaplain to Lord Ellesmere when chancellor (*q*). But it is only in very recent times that men have, as a general rule, been made judges in the Court of Chancery who have specially devoted their study to the doctrines of equity as distinguished from the rules and practice of common law courts. Equity lawyers are of very modern extraction (*r*).

The establishment of a series of rules and precedents guiding and controlling the judgment of equity judges, and, to a great extent, excluding the application of any peculiar personal notions of justice, at the same time extending and defining the nature of the relief which the Court of Chancery will, and which a court of common law will not, grant, has been gradual. Among other *questiones vexatæ*, one great one occurred as to the power of the Court of Equity to interfere with judgments or proceedings in courts of law, a notable dispute as to which was set on foot by Sir Edward Coke, then chief justice of the Court of King's Bench. That distinguished

Assumption
of power
over Com-
mon Law
Courts.

(*n*) Spelm. Gloss. 111; Dugd. Chron. Ses. 50.

(*o*) Wriothesly, St. John, and Hatton.

(*p*) Goodrick, Gardiner, and Heath.

(*q*) Biog. Brit. 4278.

(*r*) It is said that when Lord Eldon first practised at the bar, there were but twelve or fifteen counsel regularly practising at the chancery bar. Twiss's Life of Lord Eldon, p. 117.

judge strenuously contended against the assumption which was made on the part of a court of equity to restrain by injunction, *i. e.*, on pain of imprisonment, a complainant at law from pursuing his remedy at law, and reaping the fruits of his success.

This contest, which took place when Lord Ellesmere was chancellor (A.D. 1616), was so warmly carried on, that indictments were preferred against the suitors, the solicitors, the counsel, and even a master in chancery, for having incurred a *præmunire* by questioning in a court of equity a judgment in the Court of King's Bench obtained by gross fraud and imposition (*s*).

This matter being brought before the king, was by him referred to his learned counsel for their advice and opinion, who reported so strongly in favour of the courts of equity (*t*), that his majesty gave judgment on their behalf; but, as might be expected from King James's character, he, not content with the irrefragable reasons and precedents produced by his counsel (for the chief justice was clearly in the wrong), chose rather to decide the question by referring it to the plenitude of his royal prerogative (*u*). Sir Edward Coke submitted to the decision (*x*), and thereby made atonement for his error; but this struggle, together with the business of *commendams* (in which he acted a very noble part) (*y*), and his conduct

(*s*) Bacon's Works, iv. 611, 612, 613.

(*t*) Whitelock on Parl. ii. 390; 1 Ch. Rep. Append. 11.

(*u*) "For that it appertaineth to our princely office only to judge over all judges, and to discern and determine such differences as at any time may and shall arise between our several courts touching their jurisdictions, and the same to settle and determine as we in our princely wisdom shall find to stand most with our honour," &c. 1 Ch.

Rep. Append. 26. Williams, *Jus Appellandi*, p. 123.

(*x*) See the entry in the council book, 26 July, 1616; Biog. Brit. 1390.

(*y*) In a cause of the Bishop of Winchester, touching a *commendam*, King James conceiving that the matter affected his prerogative, sent letters to the judge not to proceed in it till himself had first been consulted. The twelve judges joined in a memorial to his majesty declaring that their compliance would

relative to the commissioners of sewers in insisting upon their being subject to the control of the Court of King's Bench were the open and avowed causes (x) first of his suspension and then of his removal from office.

Lord Bacon, who succeeded Lord Ellesmere, reduced the practice of the court to a more regular system (a); but did not sit long enough to effect any considerable revolution in the science of equitable jurisprudence itself, and few of his decrees that have reached us are of any great consequence to posterity.

His successors, in the reign of Charles I., did little to improve upon his plan. Lord Clarendon, when the seal was committed to him, had withdrawn from practice as a lawyer nearly twenty years (b), and the Earl of Shaftesbury, who received it on Clarendon's fall, though a lawyer by education, had never practised at all. But somewhat later there was a change, when, in 1673, Sir Heneage Finch, afterwards Earl of Nottingham, became chancellor. He was a person of the greatest abilities and most incorruptible integrity, a thorough master and zealous defender of the laws and constitution of his country. His genius enabled him to discover the true spirit of justice, notwithstanding any embarrassments raised by the narrow and

be contrary to their oath and the law. But upon being brought before the king and council they all retracted and promised obedience in every such case for the future, except sir Edward Coke, who said, "that when the case happened he would do his duty." *Biog. Brit.* 1388.

(x) See Lord Ellesmere's speech to sir Henry Montague, the new chief justice, 15 Nov. 1616. (*Moor's Reports*, 828.) Sir Edward Coke might probably have retained his seat, if during his suspension he would have complimented Lord Villiers (the new favourite) with the disposal of the most lucrative office

in his court. *Biog. Brit.* 1391.

(a) He appears to have published, about the year 1618, a collection of orders, comprising the more important rules of practice which had previously obtained. See *Chancery Commission Report*, p. 10.

(b) Lord Clarendon's *Orders as to Practice*, published in 1661, which, however, were little more than copies of those published in 1656 by the Lords Commissioners Whitelock, Lenthall, and Keeble, continued in force as regulating the practice of the court until very recent times.

technical notions prevailing in courts of law, and the imperfect ideas of redress then recognised in courts of equity. The reason and necessities of mankind, arising from the great change in property by the extension of trade, and the abolition of military tenures, co-operated in establishing his plan, and enabled him to build up, in the course of nine years, a system of jurisprudence and jurisdiction upon wide and rational foundations. This has been extended and improved by the many great men who have since presided in chancery, and constitutes a noble monument to their memory, *monumentum ære perennius*. The great variety in the necessities, the desires, and the habits of society, and the craft of men following the increase of riches, rendered the comparatively simple procedure of courts of law inadequate for the complete administration, though often well adapted to the ordinary administration of justice; and this led, as we see, to the application for an adequate remedy to the jurisdiction of the Court of Equity, and thereby to the establishment of that jurisdiction. Now this application was always in the form of a petition of the party aggrieved, stating the grievance, the defect of remedy in the courts of common law, and mentioning the remedy which it was conceived ought to be administered. By the nature of most of such cases, a part of this remedy consisted in the unravelment of a long chain of fraud, the examination of complicated accounts, or the administration of large properties; the mere enumeration of these seems suggestive of cumbrous machinery, and it must be admitted as a fact, that the procedure which grew up in the court, though powerful to redress wrong, was also often, and this from an almost excess of caution, attended with such delay and expense as almost to defeat its own objects. This was a grievance not likely to escape the reforming spirit of the present century. It was easily recognised that whilst the motive vital power of the court might be developed and expanded, the weight of its machinery,

which bore it down and diminished its efficacy, might be with safety lessened. Accordingly, in 1824, a royal commission was appointed to consider whether any alterations might advantageously be made in the practice of the court so as to abridge the expense and time attending proceedings in the court. This commission, in 1826, made an elaborate report, and since that time numerous statutes have been passed for the purpose of remodelling the procedure, and correcting errors, or supplying deficiencies in the various offices of the court (*c*). By abolishing many useless forms and requisitions, due to an over anxiety for the prevention of injustice, by retaining only those rules of practice which involve the essence of the administration of justice, by adding further powers to the court, a reform has been carried out to such an extent that we may safely affirm, that at the present day the Court of Chancery is nearly as free from reproach on the score of useless formalities, expense, and delay, which bring disappointment to the suitor, as it has ever been in regard to the purity of the principles governing its decisions. We shall presently recur to this subject in the course of giving an outline of the present procedure by suit. We have, in what we have said, sufficiently traced in outline the history of the establishment of the court as a court of equity, presided over by the Chancellor, Lord Keeper, or Lords Commissioners for the custody of the great seal (*d*). It remains to say somewhat concerning the other officers and the present subdivision of judicial labour.

In addition to the Lord Chancellor, there has been from

(*c*) See 2 Will. 4, c. 33; 2 & 3 Will. 4, c. 111; 5 & 6 Vict. c. 103; 3 & 4 Vict. c. 94, amended by 4 & 5 Vict. c. 52; 5 Vict. c. 5; and 8 & 9 Vict. c. 105; 11 & 12 Vict. c. 10; 13 & 14 Vict. c. 35; 14 & 15 Vict. cc. 4, 83; 15 & 16 Vict. c. 86, amended by 17 & 18 Vict. c. 100, and 18 & 19 Vict. c. 134; 15 & 16 Vict. c.

87, amended by 16 & 17 Vict. c. 98; 16 & 17 Vict. cc. 22, 78; 21 & 22 Vict. c. 27; 23 & 24 Vict. c. 149; 25 & 26 Vict. c. 42; and other statutes cited below.

(*d*) As to the authority of a lord keeper, see 5 Eliz. c. 18; and as to that of lords commissioners, see 1 W. & M. c. 21.

The Master
of the Rolls.

the earliest existence of the court (*e*), an officer called the Master of the Rolls, to whom the custody of the records, or rolls of the court, was entrusted. It appears, however, that his duties always extended beyond those merely of a conservator to the superintendence of the issue of writs (*f*), and there seems no doubt that he in very early times took part in the judicial administration, not only of the common law, but also of the equity side of the court (*g*), though as to the exact extent of his authority there has been much controversy (*h*); but it is certain that he in later times acted as a judge, subordinate in authority to the Chancellor, his decisions being subject in some degree to modification by the Chancellor. In order to remove the doubt as to his authority in hearing and determining causes, an act was passed in the reign of Geo. II. (3 Geo. 2, c. 30), by which it was declared that all orders and decrees made by him, except such as by the course of the court were appropriated to the great seal alone, should be deemed to be valid, subject nevertheless to be discharged or altered by the Lord Chancellor, so as they should not be inrolled until signed by his lordship. The business disposed of by him continued, however, to be of limited character (*i*) until another act, passed more recently (3 & 4 Will. 4, c. 94), has further declared what judicial power

(*e*) In the earliest notice of a master of the rolls extant in the records of the court, it is said that the custody of the rolls of chancery was committed to Adam de Os-godby, "*ita quod custodiam illam eodem modo habent quo alii custodes eam habere consueverunt temporibus retroactis.*" Thus indicating the then ancient nature of the office. Rot. Claus. 23 Edw. 1. See also 2 Com. Dig. 208.

(*f*) 4 Inst. 82; Registrum Bre-vium, 7.

(*g*) See a Discourse of the judicial

authority belonging to the office of the Master of the Rolls, 2nd edit. 1728. This work is ascribed to Lord Hardwicke. (Harris's Life of Lord Hardwicke, vol. i. p. 195.)

(*h*) In several instances in the reign of Henry VIII. the Master of the Rolls was styled Vice-Chancellor. See Discourse, &c., p. 20.

(*i*) And extent also, for at the time, in 1813, when the office of Vice-Chancellor of England was instituted, the Master of the Rolls only held his sittings in the evening.

should be exercised by the Master of the Rolls; and under this act he now has complete power, as a judge, of primary jurisdiction.

Besides the Lord Chancellor and the Master of the Rolls, there were from very early times numerous officers ^{Other ancient officers.} having duties connected with both the common law and equity sides of the court. These offices (*k*) have, however, for the most part been abolished, and of those which remain the duties have been so far modified that it is unnecessary to do more than refer to them.

The vast increase of business in the court under the circumstances which have been already alluded to, and the great necessity which was felt for the more speedy despatch of that business, led to the appointment of a new judge, as a further assistant to the Lord Chancellor, under the title of Vice-Chancellor of England (*l*). His decrees ^{Vice-Chancellor of England.} and orders were, like those of the Master of the Rolls, subject to the revision of the Lord Chancellor.

Subsequently, in the year 1841 (*m*), when the equitable jurisdiction which had previously been exercised by the

(*k*) The masters in chancery were the principal of the subordinate officers, being appointed by letters patent. They were "for the most part doctors of the civil law, and do assist the court to show what is the equity of the civil law." (Ellesmere's Office of the Lord Chancellor, 37. See, also, 4 Inst. 82; Smith's Commonw. bk. ii. c. 12.) Their duties in very early times were, as before stated, mostly connected with framing writs; in later times, they transacted the greater part of the ministerial business, such as prosecution of inquiries into pedigrees, accounts, &c. Their offices, after being regulated by 3 & 4 Will. 4, c. 94, and 10 & 11 Vict. c. 60, were abolished by 15 & 16 Vict. c. 80, being replaced by the

chief clerks of the judges. Other ancient officers were the cursitors, whose offices were similar in character, but of inferior importance to the ancient masters, being the framers of those writs which were in common form (*brevia de cursu*), and the six clerks, who acted as attorneys on behalf of the suitors. See a Treatise on the Practice of the Court of Chancery, London, 1672, p. 66; and Gilbert's History and Practice, p. 9.

(*l*) See 53 Geo. 3, c. 24.

(*m*) See 5 Vict. c. 5; 14 Vict. c. 4; and 15 & 16 Vict. c. 80; by the last of which acts (s. 52) perpetual authority was given to fill up vacancies in the number of Vice-Chancellors.

The Vice-
Chancellors.

• Court of Exchequer was transferred to the Court of Chancery, two more Vice-Chancellors were appointed. At that time the Master of the Rolls had complete authority to hear and determine causes at all their stages, so that there were thus constituted four courts of primary jurisdiction of equal authority, but the decisions of all subject to appeal. The business of hearing appeals from these courts of primary jurisdiction soon became the principal duty of the Lord Chancellor, whilst sitting in chancery, and he has for some time confined his attention almost exclusively to it. The labour of this appellate business is now shared by two judges, called the Lords Justices of the Court of Appeal in Chancery, who, with the Lord Chancellor, now form the Court of Appeal in Chancery. This court was constituted in the year 1851 (*n*); it possesses and exercises all the jurisdiction previously possessed by the Lord Chancellor, and exercises and performs all powers, authorities, and duties, as well ministerial as judicial, incident to such jurisdiction, and also any which recent legislation may have added to those formerly belonging to the Lord Chancellor sitting in the Court of Chancery.

The functions of the Court of Appeal may be exercised not only by the full court of the three judges, but by the Lord Chancellor alone (who, it may be observed, retained his former jurisdiction unaffected (*o*)), or by the Lord Chancellor sitting with one Lord Justice, or by the Lords Justices sitting together, apart from the Lord Chancellor (*p*). And by a still more recent act, power is given to each of the Lords Justices to sit separately as a Court of Appeal, for the purpose of hearing appeals from interlocutory orders of the primary courts (*q*).

The obvious advantages which result from the union of the two principles of justice, law and equity, so as to

(*n*) See 14 & 15 Vict. c. 83, ss.

1, 3, 5.

(*o*) 14 & 15 Vict. c. 83, s. 11.

(*p*) *Ib.*

(*q*) 30 & 31 Vict. c. 64, amended by 31 Vict. c. 11.

enable one tribunal completely to dispose of a case before it, have of late been much insisted upon, and there is a great tendency to give jurisdiction to courts of equity to deal with a case with the same powers and means of redress that courts of law have, and correlatively to give courts of law some equitable jurisdiction, each court retaining, however, its original distinctive character in respect of its primary functions.

Courts of equity have by recent acts been successively enabled (*r*) and required (*s*) to determine questions of law in cases where it was the old practice to require them to be decided by a common law court; moreover, the novel power has been given (*t*) to summon juries for the determination of questions of fact and the assessment of damages, in certain cases, instead of granting an injunction against breach of contract or continuance of a wrongful act, or of granting specific performance of a contract. These enactments, by giving the Court of Chancery the power of dealing with a case in the same manner as a court of law would do, render its powers, in such cases, as complete as those possessed by the Roman Prætors. Again, by another act (*u*), courts of common law have power given them to a limited extent to deal with equitable grounds of defence to an action, and also to grant, in some cases, similar relief by injunction to that which the Court of Chancery alone previously granted.

It must not, however, be supposed that by the changes we have just mentioned, the Court of Chancery has become a court both of law and equity for all cases; otherwise, it would, of course, be the only court to which suitors would ever resort in important cases, which is not the fact. The rule has been laid down (*x*), that unless some relief is sought of the peculiar character which

(*r*) 15 & 16 Vict. c. 86.

(*s*) 25 & 26 Vict. c. 42.

(*t*) 21 & 22 Vict. c. 27.

(*u*) 17 & 18 Vict. c. 125.

(*x*) *Durell v. Pritchard*, L. R. 1 Ch. 244; *Ferguson v. Wilson*, L. R. 2 Ch. 77 (see pp. 88, 91).

alone the court could formerly grant, and unless there is a proper case for such relief, the court will not interfere. A similar remark applies to the common law courts. They have only a limited power of dealing with equitable doctrines. Besides, the practice and mode of procedure, as we shall hereafter see, are still entirely distinct. There is, therefore, at present, no fusion of the two courts, and it remains equally important, now as formerly, to understand the distinction between law and equity, and the nature of the redress obtained in one court and in the other. To explain the principles which govern a court of equity, and regulate its decisions, and which are not recognised by a court of law as legal doctrines, and to show the character of the relief which a court of equity gives as distinguished from that which is obtained in a court of common law, will be our next task. It is, however, one of great difficulty, because we are necessarily precluded from giving that complete and exhaustive account of the doctrines of equitable jurisprudence, which alone will completely separate and distinguish those doctrines on the one side from the more rigid rules adopted in common law, and on the other from the principles of natural morality, which must be left to the enforcement of the conscience alone, such as charity, or gratitude.

CHAPTER V.

THE EQUITABLE JURISDICTION OF THE COURT OF CHANCERY.

IN the course of tracing the history of the Court of Chancery as a court with equitable jurisdiction, it has been inevitable that we should occasionally refer to some of the principles of equity which govern its decisions. The subject is, however, worthy of some further notice. But since equitable jurisprudence, as now established, is of so vast and yet refined a character that it would be wholly impossible, within the limits of this work, even to trace to its source each leading principle, much less follow the course of decisions in all the various ramifications into which those principles spread, we must be content, abandoning the historical method, with an endeavour to exhibit a general outline of the present jurisdiction of the court, and the nature of the relief granted; and we shall afterwards give a short account of the mode in which, by suit and other proceeding, that jurisdiction is exercised.

Although the nature of equitable jurisprudence is now defined by rule and precedent with very considerable exactness (*a*), so that cases do not frequently occur in which there is any serious dispute whether or not this court ought to assume jurisdiction in exclusion of that of common law courts, yet it is by no means easy—or rather we may say it is impossible—to give any general description or definition which shall at once be brief, intelligible,

Equitable jurisprudence is definite, yet not easily defined with brevity and accuracy.

(*a*) See *Bond v. Hopkins*, 1 Sch. & Lef. 428.

Attempted
definitions.

and even approximately accurate. Such an attempt has often been made, never with a satisfactory amount of success.

Equity
states the
rigour of
the law.

Thus it has been said (*b*) that it is the business of a court of equity in England to abate the rigour of the common law; and, undoubtedly, there have been cases where equitable interference has had this effect; but all the rules of common law which equity has so taken upon itself to overrule have long since been well defined, and many of them have ceased, even at common law, to govern the judgments of the court (*c*). In illustration of this, and as an instance of a change in rules of law, due to the establishment of equitable doctrines, we may mention what has taken place as to penal bonds. Bonds appear to have originally been invented to evade the absurd law prohibiting the taking of interest for money lent. If a debtor failed to repay the principal money and interest, since judgment could not be given for interest, the penalty might, with some show of justice, be demanded specifically. And courts of law held this. Unfortunately, they continued to act upon this view after the payment of interest became legal; and even after the statute 37 Hen. 8, c. 9, had declared the debt to be the "just and true intent" of the parties to the contract, they refused to consider the payment of principal, interest, and costs, as a full satisfaction of the bond. Now, it is clear that the object of parties in an ordinary case of a bond is not to provide the penalty as a compensation for default, but to secure that default should not be made. If, there-

Equitable
doctrine of
penalties
adopted by
courts of
law.

(*b*) Lord Kames' *Princ. of Equity*, 44.

(*c*) In addition to the case mentioned in a former note and in the text, we may add those ancient and now obsolete rules referred to by Lord Campbell, as instances of "absurdities of common law judges," viz., that no action could be main-

tained, or a claim founded, upon a deed detained in the hands of another; and that if a deed of grant were lost, the thing granted was lost with it; that a man was liable to pay money due by deed twice over, if on payment he omitted to take an acquittance under seal.

fore, after default in the strict performance of the duty contracted for, and in respect of which the penalty is imposed, the defaulter can substantially place the other party in as good a position as if no default had occurred, which may often happen, it is unfair and harsh to enforce the penalty. Accordingly, equity interfered in aid of the obligor (*d*). Similar remarks apply to the forfeiture of mortgaged lands, because the only object of a mortgage is a security for the repayment of money with interest, and therefore a forfeiture of the lands ought not actually to take place until it is proved, in the most definite manner, that the money cannot be repaid. These equitable principles, after long being acted upon in the Court of Chancery, were, like several others (*e*), at last forced upon courts of law by the legislature (*f*).

The educational course which thus, it seems, courts of equity have furnished to courts of law has been long so far completed that no new doctrines in equity opposed to the rules or doctrines of courts of law have been established. Nor does equity ever now profess to criticise or review decisions of courts of law; moreover, it does not, and never did, interfere to mitigate the severity, when any exists, of rules of positive law. For instance, it never was the business of the court of equity to relax the law which formerly existed in this country that lands descended to the heir free from any liability to the simple contract creditors of the ancestor; or the rule that a father or other ancestor should never succeed to the lands of his son; or, again, the rule by which a half-brother was postponed in the inheritance of land to a remote relation of the whole blood. These rules were, unquestionably, unjust, and have been abrogated by the

Equity in general follows rules of positive law.

(*d*) Portia need not, in a court of equity, have quibbled to save Antonio from Shylock's knife. The argument would, however, have been there scarcely so dramatic as Shakespeare has given it.

(*e*) Another instance is the doctrine of set-off, as to which see *ante*, p. 13. "

(*f*) 4 Anne, c. 16; 7 Geo. 2, c. 20.

legislature; but until the interference of that authority they were the law of the land, and, as such, observed as well by courts of equity as other courts, "*hoc quidem per quam durum est, sed ita lex scripta est*" (g).

It, in some instances, has almost disregarded positive law.

The law of primogeniture, as it obtains in this country, is not looked upon with favour in other countries, and in the opinion of many is not well founded in justice, yet no one would think for a moment of urging any argument as to its injustice in a court of equity. In such cases equity not only does not pretend to override law, but expressly and professedly follows the law. Nevertheless, even this must not be stated entirely without qualification. There have been a few cases where, if equity has not absolutely put an end to positive law, it has shot not much short of that mark. The most remarkable of these is the manner in which courts of equity have dealt with the Statute of Frauds. This was an enactment of the greatest benefit to society, yet it left a wide door open to the very vice of fraud which it was intended to exclude, an instance of the extreme difficulty attending all human arrangements. This door equity has boldly shut by disregarding the statute. The statute says that no action or suit shall be maintained on any agreement relating to lands, or of certain specified kinds, unless it is in writing signed by the party to be charged by it. Yet it is every day's practice to relieve in such a case, if the party seeking relief has by part performance of the contract, or in some other manner, been put into a situation which renders it against conscience for the other to insist upon the want of writing as a bar (h). Again, the

Relief against Statute of Frauds.

(g) Ulpian, ff. 40, 9, 12.

(h) The earliest case of the kind is *Fozcroft v. Lyster*, 2 Vern. 456; Coll. Parl. Ca. 108. Subsequent books of reports abound in cases of this kind. A very curious case, involving much discussion on the question as to the extent to which

equity would go, occurred recently. It was sought to extend the relief to the case of a verbal promise by a man to a woman whom he was about to marry, that he would leave her, by will, her own property; the marriage took place, but the promise was not fulfilled. It was held

means which courts of equity have sanctioned, of charging lands by a simple deposit of deeds relating to them, is as near to a repeal of the statute as can well be imagined (*i*). Another instance where equity has made some not inconsiderable inroad upon a rule of positive law occurs in reference to the Registration Acts (*k*). These statutes require that all incumbrances upon lands in the counties to which they relate shall, in order to be supported as against subsequent dealings, be registered. Equity has, however, modified this rule, to the extent of determining that where the person dealing subsequently has notice of the prior incumbrance, he shall give effect to it, whether registered or not (*l*).

Registration
Acts.

It is certainly a most righteous principle (*m*), that a person who has notice of the just claim of another shall not avail himself of any formal defect in the title of that other so as to oust his rights, yet, in the cases to which we now refer, to uphold this principle is almost to infringe a rule *juris positivi*.

Equity corrects the imperfections of common law whenever there are relations existing between the parties which the common law is unable to take cognizance of, and yet which materially affect their mutual rights and duties; for instance, suppose a man, knowing that he has a good title to land in the possession of another, allows him

Conscientious dealing between parties connected together by some relation of confidence is enforced, notwithstanding legal rights.

by Lord Cranworth, whose judgment was afterwards assented to by the House of Lords, that the widow could obtain no relief. *Caton v. Caton*, L. R. 1 Ch. 137; 2 H. L. 127.

(*i*) Lord Eldon appears to have thought this, and often commented on *Russell v. Russell*, 1 Bro. C. C. 269, the earliest case in which it was allowed. See *Ex parte Coming*, 9 Ves. 115.

(*k*) For Middlesex, 7 Anne, c. 20; for the West Riding of Yorkshire,

2 & 3 Anne, c. 4; 5 Anne, c. 13; and for the East Riding and Kingston-upon-Hull, 6 Anne, c. 35; and for the North Riding, 8 Geo. 2, c. 6.

(*l*) *Neve v. Le Neve*, Amb. 436; *Davis v. Strathmore*, 16 Ves. 419; *Tunstall v. Trappes*, 3 Sim. 301. As between persons who claim *in invitum*, and not by contract, such as judgment creditors, notice is immaterial. *Benham v. Keane*, 3 De G. F. & J. 318.

(*m*) See Dig. lib. 4, tit. 3.

to expend money upon it, and then ejects him; and that he then brings an action for mesne profits, here common law could not allow a set-off in the action of the money expended, yet the action would be unjust without such allowance; a court of equity would, in such a case, interfere (n).

Accounts
between
partners,
&c.

Complicated
accounts.

In the case of accounts between partners, a court of common law will not entertain an action by a man against his partner; to supply this omission, then, is the province of a court of equity. Similar cases arise between co-executors, and corporators. Again, actions of general account are quite admissible, yet the form of an action is very inconvenient for the investigation of complicated accounts; although, therefore, a court of equity is not the proper tribunal for a mere money demand, yet, from its power to investigate intricate facts, it has long exercised jurisdiction in cases of complicated accounts (o); and where there is any relation of confidence existing between the parties, such, for instance, as that of principal and agent, the case seems still more naturally to fall within the jurisdiction; but unless the accounts are mutual, and not consisting of payments and receipts on one side only, or at least very complicated, or the confidential relation is clear, the court will refuse to entertain the case (p).

Equity de-
termines ac-

Another inaccurate account of equity, as regards the

(n) *Cuedor v. Lewis*, 1 Y. & C. 427.

(o) The great facility for references of actions to arbitration under the Common Law Procedure Act, 1854, may perhaps now diminish the number of suits in equity founded upon complicated accounts.

(p) The case of *Smith v. Leveaux*, 2 De G. J. & S. 1, where the Lords Justices overruled Lord Hatherley, then V.-C. Wood, was perhaps a rather hard case, where this rule was enforced. There, the defen-

dants, a commercial firm, agreed with the plaintiff to pay a percentage of 3¼ per cent. upon all orders which might be given by persons introduced by him. The bill was for a discovery and account of these orders. It was, however, dismissed. See, for instances, *Dinwiddie v. Bailey*, 6 Ves. 136, 141; *Phillips v. Phillips*, 9 Hare, 471; and for instances concerning complication, *Taff Vale Railway Co. v. Nizor*, 1 H. L. 111; *Foley v. Hill*, 2 H. L. 28.

rules of interpretation of laws or instruments adopted by it, is that it determines according to the spirit of the rule, and not the strictness of the letter (*q*); and no doubt this is a favourite maxim of the court, but it by no means is a canon of interpretation belonging peculiarly to this court. There is not a single rule of interpreting laws which is not equally used by all judges, as well those of courts of law as of courts of equity. The law on this subject was laid down, long ago, as follows (*r*):—"From which cases it appears that the sages of the law heretofore have construed statutes quite contrary to the letter in some appearance, and those statutes which comprehend all things in the letter they have expounded to extend but to some things, and those which generally prohibit all people from doing such an act they have interpreted to permit some people to do it, and those which comprehend every person in the letter they have adjudged to reach to some persons only, which expositions have always been founded upon the intent of the legislature, which they have collected sometimes by considering the cause and necessity of making the act, sometimes by comparing one part of the act with another, and sometimes by foreign circumstances, so that they have ever been guided by the intent of the legislature, which they have always taken according to the necessity of the matter, and according to that which is consonant to reason and good discretion."

The construction of an act of parliament, therefore, is the same in all courts; or if they differ, it is only as one judge may differ from another judge in the same court, a difference which, from the difficulty which exists in framing statutes, so as to be free from ambiguity, unhappily not unfrequently occurs. It comes oftener within the province of a court of equity, acting as it does in the administration of property, to give constructions to executory instruments, such as wills, agreements for settlement,

(*q*) Lord Kames' *Princ. of Equity*,
177.

(*r*) *Stradling v. Morgan*, Plowd.
199, 204.

and the like; and in doing this, judicial liberality in the interpretation of language is often very largely called into play, but no rule of interpretation peculiar to the court is ever contended for (*s*). For instance, suppose a deed of settlement purporting to be made in pursuance of articles does not carry into effect what a court of equity would construe as the intention of the articles, a court of law adheres to the construction of the deed, and disregards the articles (*t*); and so also would a court of equity, so long as no proceedings have been taken to reform the settlement (*u*), even though the case was such that a court of equity would, probably, in a suit instituted for the purpose, reform the settlement (*x*).

Another definition that fraud, accident, and trust are peculiar objects of equity.

Insufficiency of the definition.

It has also been said (*y*) that FRAUD, ACCIDENT, and TRUST, are the proper and peculiar objects of a court of equity. This, again, is an inaccurate view to give of the subject, because, although under these three heads fall a very large number of the cases which require the interference of a court of equity, yet they fail in being a basis of classification, for courts of law have power to deal, and do deal, with numerous cases which also involve these same elements.

Accident.

Fraud is equally cognizable, and equally adverted to, in a court of law, as in a court of equity, and therefore cannot *simpliciter* be claimed as a foundation of jurisdiction. Again, formerly there were divers strict rules of legal procedure, such as that requiring profert of an instrument constituting the foundation of an action, which were not dispensed with, even though the non-profert was explained on some reasonable ground of accident; for instance, that a deed had been lost, or was in the hands of a person who

(*s*) See remarks of L. J. Knight Bruce upon the construction of documents in *Key v. Key*, 4 De G. M. & G. 84, adhered to in *Ware v. Watson*, 7 *ib.* 259.

(*t*) *Doe d. Daniel v. Woodroffe*, 10 M. & W. 608.

(*u*) *Hammond v. Hammond*, 19 Beav. 29; *Holliday v. Overton*, 15 Beav. 480.

(*x*) *Bold v. Hutchinson*, 25 L. J. Ch. 598.

(*y*) 1 Roll. Abr. 374; 4 Inst. 84; 10 Mod. 1.

refused to produce it, and consequently it was necessary to resort to equity to obtain a relaxation of such rules. But since courts of law have so far modified their rules as to make due provision for these difficulties, it has resulted that accident rarely now forms a satisfactory reason for equitable interference: and in most cases, where the jurisdiction is allowed to exist at all, it is merely because, having been once acquired, it cannot be afterwards lost or abandoned. Of those few cases which, resting upon the ground of accident, are such that relief can still only be obtained in a court of equity, we may mention, as an example, that of a defective execution of a power. If a man, having a power to appoint a fund, and intending to execute it, does so by will, when, perhaps, the power requires a deed, or where some other formalities in executing the power, not of the essence of the act, have not been observed, these are accidental circumstances which render the execution of the power bad at law; yet equity has always, if there was some good moral reason for supporting the execution of the power, such as to provide for payment of debts, or the support of wife or children, been ready to interfere and establish the execution of the power (z). It may here be noticed that equity has never ventured to correct a defective execution of a will, the mode of executing that particular instrument being one to which the legislature has paid especial attention; and though, through the accidental ignorance of an intending testator, he may fail to carry out his intention, this is an irremediable accident, and rightly so, for reasons sufficiently obvious.

As to trusts, the relation of trustee and beneficiary, *Trusts.* or *cestui que trust*, is, when a trust technically so called exists, no doubt peculiarly within the jurisdiction of a court of equity, but there are many cases substantially of trust which are cognizable in courts of law; for in-

(z) *Chapman v. Gibson*, 3 Bro. C. C. 229; *Tollet v. Tollet*, 2 P. W. 489.

stance, deposits and all manner of bailments, and especially that implied contract, so highly beneficial and useful, of having undertaken to account for money received to another's use, which is the ground of an action on the case almost as universally remedial as a bill in equity. And there are cases where courts of law take notice even of trusts, commonly so called; for instance, a court of law allows an executor or administrator to retain for a debt owing to a trustee under a trust of which the executor or administrator is the *cestui que trust* (a).

The above inaccurate definitions contain some truth.

All these descriptions of equity, then, as distinguished from law, in our system of administration of justice, are, as we see, inaccurate and incomplete; and yet, to no inconsiderable extent, they assist the mind in comprehending what portion of the whole area of justice is taken possession of by the Court of Chancery. For equity does, in each department of natural justice indicated by these descriptions, go farther, and take a wider and less restricted view than courts of law do, and so it is able to approach somewhat nearer to that complete and perfect result, the attainment of which is scarcely to be hoped by the most sanguine.

Fraud in the eye of this court may exist without moral fraud.

In a court of equity, many actions, not criminal in themselves, nor even done with a wrong intention, are scrutinised, and often disapproved of and set aside, when to impugn them in a court of law would be impossible. There have been cases, indeed, in which equity has been thought to have gone too far in attempting to enforce a scrupulous adherence to conscientious dealing, and the rules of the court have consequently been relaxed in this respect (b).

(a) *Roskelley v. Godolphin*, Raym. 483; S. C. 2 Show. 403; and *Skinner*, 214; *Marriott v. Thompson*, Willes, 186; *Loane v. Casey*, 2 W. Black. 965. See further on this subject *Thompson v. Thompson*, 9 Price, 464; *De Tastet v. Shaw*, 1

B. & A. 664.

(b) This has recently been the case as to the rule of the court, that a purchaser of a reversion bears the burden of proving that he gave full value. See 31 Vict. c. 4, which enacts, s. 1, that no pur-

When there are dealings between persons standing in a relation of confidence to one another, or so connected that one is liable to be under the influence of the other, the court most jealously watches over and controls their transactions, and readily interferes to prevent any abuse of the confidence, and prevent any undue exercise of the influence so existing. The exact limits of this jurisdiction, which has frequently and justly been said to be of the most salutary kind, have advisedly never been defined, but "it cannot be too freely applied either as to the persons between whom, or the circumstances in which, it is applied" (*c*). It extends to "all the variety of relations in which dominion may be exercised by one person over another" (*d*). It would lead us too far if we were to follow this principle into all the numerous relations to which it has been applied, for bills to set aside transactions of this character are of daily occurrence; the commonest classes of cases are those where the transactions are between parent and child (*e*), guardian and ward (*f*), solicitor and client (*g*), and surgeon and pa-

Dealings between persons connected by confidential relations.

chase made *bond fide*, and without fraud or unfair dealing, of any reversionary interest in real or personal estate shall be set aside merely on the ground of undervalue.

(*c*) *Per* Sir G. Turner, in *Billage v. Southee*, 9 Hare, 540. See, also, *Tate v. Williamson*, L. R. 2 Ch. 55; *Rhodes v. Bate*, L. R. 1 Ch. 252.

(*d*) *Per* Sir S. Romilly, *arguendo* in *Huguenin v. Baseley*, 14 Ves. 28; and see *Dent v. Bennett*, 4 M. & Cr. 277 (where Lord Cottenham approves of Sir S. Romilly's proposition); *Norton v. Rally*, 2 Eden, 286, where an annuity granted by a woman in a state of religious delusion to her spiritual adviser was set aside. In a very recent case of *Lyon v. Home*, L. R. 6 Eq. 655,

large gifts by a woman, impressed with the belief of spirits, to the person who represented himself as the "medium" of communication with her late husband's spirit, were set aside.

(*e*) *Cocking v. Pratt*, 1 Ves. 401; *Wright v. Vanderplank*, 2 K. & J. 1; *Hoghton v. Hoghton*, 15 Beav. 278. The cases of this class, which are very numerous, extend to a person who has placed himself *in loco parentis*; *Archer v. Hudson*, 7 Beav. 551; and as to elder and younger brothers, see *Sercombe v. Saunders*, 34 Beav. 382.

(*f*) *Hylton v. Hylton*, 2 Ves. 549; *Hatch v. Hatch*, 9 Ves. 292.

(*g*) *Proof v. Hines*, Ca. t. Tall. 116; and see Lord Brougham's judgment in *Hunter v. Atkins*, 3

tient (*h*): it may be added, that if the benefit be conferred upon third parties who have taken no part in the transaction, and are therefore innocent of all fraud, still they will not be allowed to retain that which comes through a polluted channel (*i*).

Notwithstanding the willingness of the court to exercise this control over the consciences of men, great caution is observed not to encroach upon the functions properly exerciseable by other courts; and a remarkable case of the refusal of the Court of Chancery to interfere is that of *Allen v. M^cPherson* (*k*), where the House of Lords, sitting as a court of appeal from the Court of Chancery, held that the court would not after probate set aside a will obtained fraudulently and by undue influence.

From what we have shown, it will be observed that equity does in no inconsiderable measure fulfil the popular notion entertained of it, that it aims at complete justice irrespective of any legal quibble or technical difficulty. Still, it must carefully be borne in mind, that the court is slow at the present day to convert any moral doctrine which has not already been made a ground of equitable jurisdiction, into a principle of equity. We pass on now to another and wholly distinct ground which has been occupied by the court, and where it has brought within the range of its influence a large field of jurisdiction.

The court from the earliest times has adopted a mode

M. & K. 135. As to the relationship of counsel and client, *ante*, p. 24.

(*h*) *Billage v. Southce*, 9 Hare, 534.

(*i*) *Bridgman v. Green*, Wilm. 58, 64; 2 Ves. 627.

(*k*) 1 H. L. Ca. 191. It will be observed that the decision was made by three lords (Lords Lyndhurst, Brougham, and Campbell) who were more particularly versed in com-

mon law, against the opinions of two others (Lords Cottenham and Langdale), who were equity judges. See the discussion in *Hunt v. Hunt*, 31 L. J. Ch. 161, where a husband was restrained from suing in the Divorce Court for restitution of conjugal rites, contrary to his covenants in a separation deed; and the very recent case, *Springhead Spinning Co. v. Riley*, L. R. 6 Eq. 551.

of giving relief, different in its nature from that which is usually given by courts of law, and this has drawn within its cognisance a vast series of cases where the suitors think that the relief in a court of law is inadequate to their wants. The relief given by the Court of Equity may be described as of a positive character, giving the specific thing which the parties are entitled to, whilst actions at law, with a few exceptions (*l*), give only the negative remedy of compensation by damages for a deprivation or violation of the true right.

Positive relief which the court gives.

Wherever possible, equity takes care that a right shall be actually enjoyed, and with this view will interfere to prevent a violation of that right (*m*). A court of law will not interfere till the violation be effected. It, for instance, will, when a breach of covenant in a lease or in a contract between landowners has been committed, give damages for the breach, but a court of equity will do more, it will anticipate the event, and restrain a person who merely shows an intention to break his covenants (*n*). Or, to take another example illustrating the beneficial result obtained by such ready interference, damages will be given in the one court if a man has been carrying on a trade in some particular locality in violation of his contract with another man not to do so. But these damages,

(*l*) Actions of ejectment, trover, *quare impedit*, and dower (retained by 3 & 4 Will. 4, c. 27) are not of the negative kind; and see *post* for a view of the remedies furnished by common law courts under their powers, as enlarged by recent legislation. There still, however, remain sufficient defects in positive relief furnished by them, to make the statements in the text true.

(*m*) See, for a strong example, *Lloyd v. London, Chatham, and Dover Railway Co.*, 2 De G. J. & S. 568, where the work constructed in violation of the right claimed was a

work of public importance.

(*n*) See *French v. Macale*, 2 Dru. & War. 269; *Lord Grey de Wilton v. Sacon*, 6 Ves. 106; *Tulk v. Moxhay*, 2 Ph. 774. The remedy is extended even to restrain an underlessee from committing breaches of covenants in the original lease, of which he is ignorant. *Parker v. Whyte*, 1 H. & M. 167; and even a tenant from year to year of a freehold owner, who had contracted with a previous owner that the land should not be used as a beer-shop. *Wilson v. Hart*, L. R. 2 Ch. 463.

which will be only given for past acts of trading, are, it may be, of small value as a remedy compared with the effectual relief which the other court gives by prohibiting the trade on pain of imprisonment. This positive kind of relief is clearly of great value in these cases; it will even be granted although the parties by their contract have fixed the amount of damages in respect of the breach (*o*).

The two kinds of justice which may be obtained, the one strictly remedial, the other preventive in respect of the violation of continuing rights, are clearly different in kind;—one is legal, the other equitable;—and neither of the two courts will usurp the functions of the other. If the injury complained of be completed, so that compensation alone can be awarded, the court of equity has nothing to do with the case (*p*), although the court now (*q*) can in many such cases award damages in addition to or even, according to its discretion, in substitution for the injunction; yet it will refuse to interfere altogether if a court of law could have given every remedy which the case admits of (*r*). On the other hand, courts of law,

(*o*) *Howard v. Hopkins*, 2 Atk. 371; *Roy v. Duke of Somerset*, *ib.* 190; *Chilliner v. Chilliner*, 2 Ves. S. 528; *Logan v. Wienhold*, 7 Bl. N. S. 1; *Roper v. Bartholomew*, 12 Price, 796; *Hardy v. Martin*, 1 Cox, 26; *City of London v. Pugh*, 4 Bro. C. C. 395, Toml. Ed.; *French v. Macale*, 2 Dru. & War. 269; *Barret v. Blagrove*, 5 Ves. 555; *Fox v. Scard*, 33 Beav. 327; *Howard v. Woodward*, 34 L. J. Ch. 47; *Long v. Bowring*, 33 Beav. 585; *Coles v. Sims*, 5 De G. M. & G. 1; from which cases it will be seen that the fact of a penalty, or even liquidated damages, being fixed by the parties, is not regarded by the court, if the real intention was that

the agreement should be observed. If, however, it appears that the observance of the agreement and the payment for the breach were equally within the intention, then the court will not interfere. See *Woodward v. Gyles*, 2 Vern. 119; *Rolfe v. Peterson*, 2 Bro. P. C. 436, Toml. Ed.; *Ponsonby v. Adams*, *ib.* 431.

(*p*) See cases cited in preceding note, and *Saniter v. Ferguson*, 1 M. & G. 286.

(*q*) Under the recent act, 21 & 22 Vict. c. 27, see as to this act in connection with specific performance, *post*, p. 68, note (*c*).

(*r*) *Durrell v. Pritchard*, L. R. 2 Ch. 244.

though able now under certain circumstances to issue a writ of injunction, will not entertain any application when no breach has been committed.

Another branch of the same kind of positive relief is the power which the court exercises of compelling the specific performance of agreements. A man may be indirectly compelled to carry out his contract by the fear of being mulcted in damages by a court of law, in the event of his failing to do so; but another, and often a desirable mode, is to insist upon his performing the duty which he owes under the contract by putting him in prison till he does so; or, as may happen in some cases, to do it for him, of course at his cost. The latter are the courses which the Court of Chancery adopts. If a man agrees to sell land, he will be at the proper stage of a suit in equity, instituted for the purpose, ordered to execute a conveyance, and if he disobeys he will be imprisoned for contempt: or the court will make an order vesting the land having the same effect as if he had executed it (*s*). By virtue then of the peculiar reliefs which this court is able to give, and which other courts cannot give, the specific performance of contracts forms an important branch of equitable jurisdiction. But it is not every contract that will draw with it an equity to compel its fulfilment. Some contracts are obviously entered into solely for the purpose of making a profit; of this kind are the ordinary commercial contracts for the purchase or sale of goods such as are constantly in the market: in the case of these contracts, if they be broken, damages are all that are or can be required; with these, therefore, equity has nothing to do. Other contracts are of a peculiar nature, involving personal conduct or some similar ingredient, such as to sing at a theatre (*t*), or write

(*s*) Under the Trustee Act, 1850, M. & G. 604; *Kemble v. Kean*, 6 see s. 30. Sim. 333.

(*t*) *Lumley v. Wagner*, 1 De G.

a book (*u*), or keep an inn (*x*), or even build a house (*y*). It is considered to be beyond the power of any court to secure the due performance of such acts by any amount of compulsion (*z*), and so equity will not decree their performance; nevertheless, in many of even these cases, equity will, indirectly, do much towards securing the due completion of the agreement; for if the contract contain a negative clause correlative to the positive agreement, such as not to sing at any other theatre, or not to write plays for any other theatre, equity will interfere by restraining a violation of the negative clause (*u*). This interference will be granted, however, only on condition that the plaintiff who seeks the aid of the court is not himself under any obligation to do any acts of that nature which the court cannot specifically enforce. This is an obviously reasonable condition, for it would be contrary to all the practice of the court to give equitable relief to one over whom the court has not complete control in respect of his correlative duties (*b*).

What we have said shows the general character of contracts which may form the subject of a chancery suit; many nice distinctions have been taken upon the subject (*c*), but into these we cannot here enter. The contracts

(*u*) *Clarke v. Price*, 2 Wils. 157; and see *Morris v. Colman*, 18 Ves. 437.

(*x*) *Hooper v. Brodrick*, 11 Sim. 47.

(*y*) *Brace v. Wehnert*, 25 Beav. 348; *Taylor v. Portington*, 7 De G. M. & G. 328; *Lytton v. Great Northern Railway*, 2 K. & J. 395.

(*z*) For other cases where the question has arisen, see *Kimberley v. Jennings*, 6 Sim. 340 (hiring and service); *Hills v. Croll*, 2 Ph. 60 (purchase of acids); *Dietrichsen v. Cabburn*, 2 Ph. 52 (purchase of patent medicines); *Stocker v. Wedderburn*, 3 K. & J. 393 (promotion

of a company); *Ogden v. Fossick*, 32 L. J. Ch. 73 (employment as agent); *Blackett v. Bates*, L. R. 1 Ch. 117 (supply of engine power); *Gervais v. Edwards*, 2 Dr. & War. 80; *Peto v. The Brighton, &c. Railway Co.*, 1 H. & M. 468.

(*a*) *Lunley v. Wagner*, 1 De G. M. & G. 604; *Morris v. Colman*, 18 Ves. 437. See, also, *Dietrichsen v. Cabburn*, 2 Ph. 52. The question involves many difficulties; see *Brett v. East India, &c. Shipping Co.*, 2 H. & M. 404.

(*b*) See cases in preceding notes.

(*c*) See *Onions v. Cohen*, 2 H. & M. 354; *Blackett v. Bates*, 35 L. J.

we have mentioned for the sale or purchase of an interest in land, and also of many kinds of personal property, such as shares in a company (*d*), are instances which are daily before the court. We will only add that where the main provisions of the contract have been of a description such as the court commonly deals with, but some minor accessory term is of a personal nature, the court has in a few instances ordered specific performance of that which can be so decreed, and directed a covenant to be entered into for the rest (*e*).

There are many other instances of this kind of relief by which the court substantially enforces the due observance of rights, by restraining the commission of acts in violation of them, besides cases of contract. Thus, the court will restrain the infringement of a patent of invention (*f*), the counterfeiting of a trade mark (*g*), and the piracy of a copyright (*h*).

Ch. 324; *Kay v. Johnson*, 2 H. & M. 118. The act before referred to (21 & 22 Vict. c. 27), which gives the court power to assess damages, extends to cases of specific performance, and therefore has no inconsiderable bearing upon the course of the court. See *Soames v. Edge*, John. 669; *Norris v. Jackson*, 1 J. & H. 399. The act does not extend the jurisdiction to cases not previously within it. *Wicks v. Hunt*, John. 380; *Ferguson v. Wilson*, L. R. 2 Ch. 17.

(*d*) *Paine v. Hutchinson*, L. R. 3 Ch. 388; *Evans v. Wood*, L. R. 5 Eq. 9. The court will not enforce specifically agreements for the sale of ordinary stock, which can any day be purchased at the market price. *Cuddee v. Rutter*, 5 Vin. Abr. 538, pl. 21. See notes to this case in 1 White & Tudor's L. C. 640.

(*e*) See *Wilson v. West Hartlepool*

Railway, 2 De G. J. & S. 475; *Onions v. Cohen*, 2 H. & M. 354.

(*f*) Suits of this kind are of daily occurrence, and scarce a volume of modern reports could be found not containing many.

(*g*) In *Blanchard v. Hill*, 2 Atk. 484, Lord Hardwick deprecated the interference of courts of equity in these cases; nevertheless it is now well established. *Croft v. Day*, 7 Beav. 84; *Hall v. Barrows*, 33 L. J. Ch. 204; *Leather Cloth Co. v. American Leather Cloth Co.*, 11 H. L. 523; *M'Andrew v. Basset*, 33 L. J. Ch. 561; see also *Maxwell v. Hogg*, L. R. 2 Ch. 307. The ground upon which the court has proceeded in these cases of trade marks has been much in dispute, but it seems to be founded upon a right in the nature of property. See *Leather Cloth Co. v. American Leather Cloth Co.*

(*h*) *Walcott v. Walker*, 7 Ves. 1;

Restraint of
action at
law on
equitable
grounds.

We have already adverted to the power which the court has assumed of preventing persons from proceeding at law contrary to equity and good conscience: this is done by injunction. The court has always declined laying down precise rules as to the limits within which it will keep in exercising the power of granting injunctions, but such limits may now usually be determined with sufficient accuracy by reference to precedents, a very vast number of which are contained in the reports (i).

Another species of suit, the reason for which very much arises from the power of giving peculiar relief possessed by the court is, where the court, at the instance of the plaintiff, sets aside a completed transaction. If there be good grounds for treating a conveyance of property or other deed or instrument as an improper transaction, and for setting it aside, a court of equity alone has the power to accomplish that result in a direct manner. A court of law is either powerless to deal with the case at all, or at the most possesses inadequate powers. The grounds for setting aside a completed transaction, which usually are some species of fraud, may be pleaded in a court of law; but a plea can only arise as a defence to an action of some kind, and no procedure at law is applicable for commencing proceedings to avoid the effect of a deed upon the ground of fraud. But a bill may be filed praying that a deed of conveyance or other instrument obtained in some improper manner may be set aside, and the rights of parties restored to the state in which they would have been had such deed or other instrument never been executed (k). The general

Kelly v. Morris, L. R. 1 Eq. 697, where the defendant was restrained from copying directly, although *ex necessitate rei* another work on the same subject, if correct, must give identical information, and see *Scott v. Stamford*, L. R. 3 Eq. 718; and as to publication of private letters, *Gee v. Pritchard*, 2 Sw. 402.

(i) For an early statement of the doctrines adopted by the court, see Lord Ellesmere's judgment in the *Earl of Oxford's Case*, 1 Ch. Rep. 1; and see the cases cited in the notes to that case in White and Tudor's Leading Cases in Equity.

(k) Where a vendor conveys, the price not being paid, he retains a

doctrines of equity, of course, govern the decision in such suits.

Until recently, there was a numerous class of suits called interpleader suits, or suits for relief from adverse claims. Where a man in the possession of certain goods or money not his own finds himself exposed to the adverse claims of several persons, it often happens that he cannot safely take a discharge from any of them, since it is doubtful which of them is properly entitled to claim. In such cases the court gives relief by requiring the several claimants, when brought before it in a suit instituted for the purpose, to interplead, that is, bring their claims to an issue, so as to be decided upon. Formerly, this remedy in equity was alone available for the purpose, but since similar remedies have been given to courts of law (*l*), interpleader suits are less common, being usually confined to cases where the claims are of an equitable nature.

We have seen (*m*) that the Court of Chancery had, as part of its common law jurisdiction, cognisance of a writ of partition in certain cases; and in other cases the old writ of partition issued out of chancery, but was returnable at common law; this writ was originally only applicable to the case of coparceners; it was, in the reign of Hen. VIII., extended to all cases of joint tenancy and tenancy in common, and continued to be occasionally used until abolished by the statute 3 & 4 Will. 4, c. 27, s. 36; but there were many inconveniences attending it, from the inability of courts of law to compel discovery, and to make compensation for inequality in the division of property, which obviously would often be necessary. These reasons led to the adoption of a concurrent jurisdiction by courts of equity, the practical convenience of which led to the disuse and abolition of the writ.

lien on the land enforceable in this court against the vendee and persons claiming as volunteers, even though the deed contains a receipt for the money. *Mackreth v. Symmings*, 15

Ves. 329; S. C. 1 Wh. & Tudor, 235.

(*l*) 1 & 2 Will. 4, c. 58; 1 & 2 Vict. c. 45; 7 & 8 Vict. c. 96; 9 & 10 Vict. c. 95.

(*m*) *Ante*, p. 33.

The method of procedure adopted by the Court of Chancery is by issue of a commission to make the partition and adjust the rights of the parties by giving compensation, or owelty, as it is called, where the divided portions of the land cannot be accurately made proportionate to the shares of the several owners; liberty is, however, usually given to the parties themselves to make proposals for the partition, and the court gives its consideration to these. Recently, the benefit of this action on the part of the court has been extended by giving the court power to direct a sale of the property in certain cases instead of a partition, which obviously would often be very advantageous, but previously could not be done without the consent of all concerned, a thing often, through infancy or other disabilities, not to be obtained (*n*).

Bills of
peace.

In some cases, in which a perfect and appropriate remedy exists at law, but the circumstances are such as to give rise to innumerable actions at law, founded upon the same general private right, each of which actions must be separately tried and disposed of, whether such right is a right claimed in favour or against a number of persons, equity will interfere, in order to avoid multiplicity of suits, or to prevent oppressive litigation. Thus, where the amount of a general fine, payable by all the copyhold tenants of a manor, is in dispute (*o*), or where the rights of common to which the tenants are entitled are not ascertained (*p*), equity will entertain a suit on behalf of all the copyhold tenants. Another instance of such interference is where the court will restrain a man from continuing to invade a legal right by a series of separate acts, each of which gives rise to an action, but the damages in each case are trivial; thus equity will restrain the infringement of an ancient ferry (*q*). As an instance of the interference of

(*n*) See 31 & 32 Vict. c. 40.

(*o*) Story, Eq. Jur. § 856.

(*p*) *Phillips v. Hudson*, L. R. 2 Ch. 243.

(*q*) See Vin. Abr. tit. Nuisance, G. 4; *Huzzey v. Field*, 2 C. M. & R.

432; *Att-Gen. v. Richards*, 2 Anst. 616; *Cory v. Yarmouth, &c. Railway Co.*, 3 Hare, 593. Compare also *Att-Gen. v. Sheffield Gas. Co.*, 3 D. M. & G. 304.

the court to prevent oppressive litigation, we may mention a recent case where the reservoir of a waterworks company burst, thereby causing damage to a very large number of people; a large number of claims was made against the company, all founded upon similar grounds. The company instituted a suit against some of them, for the purpose of determining, once for all, a question which had arisen, upon which turned the validity of the claims. The court entertained the bill as of the nature of a bill of peace, though, perhaps, not strictly so, since the claims were not absolutely identical (*r*).

The last head of jurisdiction, founded upon the character of the relief which the court gives, which we will mention, is the perpetuation of testimony. Courts of common law only permit the examination of witnesses when an action is at issue, and the evidence must be confined to the issue in such action. It sometimes happens that there is a reasonable certainty of litigation at a future time, yet, from the circumstances of the case, the right to be claimed or defended in such litigation cannot, or does not, form the subject of present proceedings. To take a single instance, a person may be in possession of an estate under a title depending upon a marriage, the validity of which he may have reasonable cause to fear will be disputed, and to support which, if litigation should ensue, the evidence of certain witnesses would be necessary. Now, clearly he, being in possession, can take no proceedings against a possible claimant who does not come forward; if, therefore, he had no means of preserving the evidence in question, there might result a failure of justice, because the other might await the deaths of the witnesses, and then press his claim. It is easy to suggest numerous similar instances. For all these the Court of Chancery has provided a remedy by allowing a bill to be filed to perpetuate the testimony (*s*). Never-

Perpetuation of testimony.

(*r*) *Sheffield Waterworks v. Yeo-*
muns, L. R. 2 Ch. 8.

(*s*) See Consolidated Orders, ix.
r. 6.

theless, it takes every care that this right shall not be abused, as it is obviously not unattended with danger, because witnesses, whose evidence is not to be published until a period which may be subsequent to their decease (*t*), are, under some temptation, to give interested evidence. If, therefore, by any means the issue can be tried at once, such a suit will not be allowed (*u*). When the evidence has been taken, it is sealed up until the time comes to use it, and the suit is at an end, for, of course, it never comes to a hearing, and the plaintiff pays the costs.

A modern act (*x*) has extended the benefit of this proceeding to a case not previously admitted by the court, viz., where a person would, under the circumstances which he alleges to exist, become entitled, upon the happening of some future event, to any honour, title, dignity, or office, or any estate or interest in any property, the title to which cannot be brought to trial before the happening of the event in question. It enables him to file a bill in chancery to perpetuate any testimony which may be material to support his claim. In any such suit, if the crown is interested, the attorney-general is to be made a party in respect of such interest, and in any proceedings in which the evidence taken in the suit is used, no objection shall be taken that the crown was not a party to the suit.

We have hitherto been exhibiting that part of the jurisdiction of the court which, having for its origin the ancient assumptions of power on the part of the early chancellors, although modified or enlarged by subsequent legislation, may be described as its inherent jurisdiction, depending as we see partly upon doctrines of equity, and partly upon the nature of the relief. We have

(*t*) If the witnesses are alive, and in this country, when the issue is actually raised, the evidence taken in the suit is not allowed to be read.

(*u*) *Lord North v. Gray*, 1 Dick. 14; *Parry v. Rogers*, 1 Ven. 441;

Pawlett v. Ingrej, 1 Ves. 308; see the recent case of *Ellice v. Roupell*, 32 Beav. 299, 308, 318, where the practice upon these bills was very much discussed.

(*v*) 5 & 6 Vict. c. 69; and 10 Cl. & Fin. 305.

sufficiently illustrated the various points which the subject presents to enable the reader to form a correct notion of the court's action, and its general extent and character. Those who would trace with greater precision the boundary of the field, must consult more extensive treatises than the present can be. It remains now to mention briefly the particular duties cast upon the court by the legislature, which, though allied in their nature to some of the ordinary proceedings of a court of equity, depend entirely upon their statutory origin for their present existence, so that the powers of the court are limited and defined by the statutes which created them.

Statutory
jurisdiction
of the
court.

Of these duties and powers, the most prominent at the present day are those which the Court of Chancery exercises in winding up public companies. The great extension of commercial enterprise in recent times, as developed through the medium of incorporated associations, consisting of numerous individuals, but acting as a single indivisible unit, is unhappily attended by dangers not differing in their nature from those which threaten smaller associations of two or three members constituting a private partnership. The legislature has, it is almost needless in the present day to remark, determined (working according to its habit by tentative measures, set forth in successive acts,) the laws which regulate the formation, the continuance, and, what is more to our present purpose, the dissolution of these associations. Under these acts the Court of Chancery has been constituted the tribunal to take charge of the administrative business which the dissolution of a company and the winding up of its affairs involve, whenever that administration requires the intervention of a court of justice (x). Under the principal

Companies.

(x) See sect. 81 of the Companies Act, 1862 (25 & 26 Vict. c. 89); it will be observed that for a mining company within the jurisdiction of the court of the Staunaries, that

court has also cognisance, but not exclusive cognisance. *In re Penhale and Lomax, &c. Co.*, L. R. 2 Ch. 398.

act now in force (The Companies' Act, 1862, 25 & 26 Vict. c. 89), the court entertains in a summary way applications, by petition, to wind up companies, and the collection and distribution of the assets are made under the direction of the court (*y*). Other duties in connection with the affairs of companies, not being wound up, are also cast upon the court. By the same act, the court has power to rectify the register of members, if the name of any person is without sufficient cause entered in or omitted from the register (*z*). Also under the later act of 1867 (30 & 31 Vict. c. 131), the court has other duties to perform relative to schemes for reducing the capital of companies. To these we need not refer in detail.

Somewhat analogous to the duties of the court relative to companies generally, are some special provisions made by the legislature for railway companies. Under certain circumstances, schemes for the arrangement of the affairs of these companies, when they are in financial difficulties, may be proposed to the court (*a*).

Another most important power conferred by the legislature upon the court, is that which it exercises in favour of creditors, for the purpose of enabling them to obtain satisfaction of their debts by sale of the lands of their debtor.

Payment of
debts by
sale of land.

We have elsewhere shown how lands were by slow degrees made available as assets for the payment of debts; and we here only point out, that it is by the aid of this court, that the creditor is able to proceed to the complete remedy, by sale of the lands, which the law allows.

(*y*) The rules for winding up were issued 11 Dec. 1862.

(*z*) S. 35. There is some conflict of judicial opinion as to the extent of the jurisdiction under this section; see *Ex parte Swan*, 7 C. B. 400; *Stewart's Case*, L. R. 1 Ch. 584; *Ward and Henry's Case*, L. R. 2 Ch. 231; *Ex parte Parker*, *ib.*

690; *Head and White's Case*, L. R. 3 Eq. 84.

(*a*) See 30 & 31 Vict. c. 127. The rules and orders upon which act were issued 24 Jan. 1868. As to what the scheme must provide for, and the powers of the court under the act, see *Re Cambrian Railways*, L. R. 3 Ch. 278.

This, in the case of a deceased debtor, was given by the act 3 & 4 Will. 4, c. 104. In the case of a living debtor, there were no means of applying the lands themselves to the purpose of paying debts by a sale of them until the year 1838, when the act 1 & 2 Vict. c. 110, was passed, and then, and for a long period afterwards, the process remained tedious and costly; but now a creditor who has obtained judgment, and taken the lands in execution under a writ of elegit, may obtain an order for their sale in a simple and speedy manner by petition to the court (*b*). Upon hearing the petition, the court directs inquiries to be made as to the debtor's interest in the land and his title thereto, and as far as possible conducts the sale in the same way as in the other case, where the lands of a deceased person are sold for the payment of his debts (*c*).

Inasmuch as cases of trust and those relating to infancy Trusts and
Infancy. are naturally the subjects of the care of the Court of Chancery, any improvements of the law, or facilities for the satisfaction of the wants of society which the legislature might devise, would of course take effect by the agency of the Court of Chancery; accordingly we find that several acts have been passed for the purpose of meeting the specific wants of trustees and infants. By the Trustee Relief Act (12 & 13 Vict. c. 74), trustees may in suitable cases discharge themselves from all responsibility by paying the trust moneys into the Court of Chancery, after which, the court takes upon itself the custody and distribution of the funds exactly as if a suit had been regularly commenced for the purpose (*d*). It may be noticed that this act does not, perhaps, extend the jurisdiction of the court, so much as provide peculiar and abnormal modes of approaching the court. The like may be said of several other modern enactments. The

(*b*) 27 & 28 Vict. c. 112; *Guest v. Cowbridge R. Co.*, L. R. 6 Eq. 619.

(*c*) See ss. 4 and 5, and *Thornton*

v. Finch, 4 Giff. 515.

(*d*) *Re Bloye's Trusts*, 1 M. & G. 488; S. C. sub nom. *Lewis v. Hillman*, 3 H. L. Ca. 607.

Trustee Act, 1850 (13 & 14 Vict. c. 60), provides for the appointment of new trustees of a settlement or will, in a summary and expeditious way, without instituting a suit for the general administration of the trust: and a later act (22 & 23 Vict. c. 35, s. 30) allows trustees to ask for and obtain the advice of the court upon matters relating to their trust, without the formalities of a suit.

But the legislature has done more than provide short and inexpensive modes of obtaining the benefits of the court's guidance in those matters relating to administration of property, for it has in several instances given power to the court to do more than it formerly could; it can now actually change the legal right to land or estate, if a trustee refuse to act, or be unknown, or not to be found (*e*).

Closely connected with these statutory provisions facilitating the discharge of their duties by trustees, are those which relate to the custody and management of infants and their property. Infants are, as we have before shown (*f*), peculiarly the care of the court of chancery, representing the sovereign in his character of *pārens patriæ*. The benefit derived from this care has not been without its share of legislative attention, and accordingly special and enlarged powers have been given to the court.

By the Custody of Infants' Act (2 & 3 Vict. c. 54), a mother of an infant who is in the sole custody or control of the father or his agent, or of any guardian after the father's death, may obtain an order from the court allowing her access to the infant at reasonable times; or, if the infant be within the age of seven years, the court may order the delivery of the infant into her custody until attaining that age.

Again, under an act passed in the year 1855 (18 & 19 Vict. c. 43, commonly called the Infants' Settlement Act), the court may give its sanction to a settlement by an

(*e*) 13 & 14 Vict. c. 60, ss. 34, 35, 45, 49. (*f*) *Ante*, p. 29.

infant of his or her property in contemplation of marriage; and it provides that a settlement made with this sanction, shall be as valid and effectual as if the person executing the settlement were of the full age of twenty-one years. The act is limited, however, in its application to infants who, if males, are of the age of twenty years, and if females, of the age of seventeen years or upwards (*g*).

In the following year, 1856, another act was passed (19 & 20 Vict. c. 120), which enables the court to authorise leases or sales of any settled estates (*h*), which the court may in its discretion deem proper to be carried out. This act extended the powers which had been conferred by the legislature upon the court, about twenty-six years previously (by 1 Will. 4, c. 65), enabling the court to authorise leases to be granted of lands of which an infant might be seised in fee or in tail (*i*).

The object of these acts was to allow advantage to be taken of the discovery of mineral wealth, the improvement of the value of property by the extension of towns and other causes, to obtain which advantage it had previously been common, in the case of large estates, to apply to parliament for private acts, a proceeding through its costliness inapplicable to small holdings.

By another act (25 & 26 Vict. c. 108) trustees having by the terms of their trust powers to dispose of land by sale, exchange, partition, or enfranchisement, may, with the sanction of the Court of Chancery, deal specially with the minerals (*k*).

(*g*) Section 4.

(*h*) The settlement is, by section 1, confined to cases where lands are limited for persons in succession. See as to these words, *Re Burdin's Will*, 7 W. R. 711. The act 21 & 22 Vict. c. 77, extends the operation to reversions and to copyholds, and the act is amended by 27 & 28 Vict. c. 45.

(*i*) See *In re Clarke*, L. R. 1 Ch. 292.

(*k*) This act was passed in a great measure in consequence of the decision in *Buckley v. Howell*, 29 Beav. 546. It will be noticed that several of the acts mentioned in the text confer powers upon trustees and others occupying a fiduciary character, which would be

The legislature has ever been anxious to promote the improvement of property, and has passed several acts with that object; to these we only refer here in order to remark, that whenever the consent or act of an owner of land, or of some interest in land, is necessary, and could not by reason of his infancy or incapacity be otherwise obtained, the court of chancery is empowered, in a proper case, to authorise the act, or give the consent on behalf of such infant or incapacitated person. The authority or consent is obtained upon a simple application by petition (*l*).

So where land in settlement, or belonging to persons under some incapacity to deal with their interest, is compulsorily taken for, or injuriously affected by, some work of public importance, such as a railway, canal, or public building (*m*), the special authority to take or injure which is, of course, derived from the legislature, it is always entrusted to the court of chancery to see that the money paid as purchase-money or by way of compensation, is applied in accordance with the rights of parties to the land taken or affected (*n*).

given to them by the settlement or will creating the trust, if prepared by a skilled draftsman having such a knowledge of the nature of the property as might lead him to anticipate its probable requirements. This knowledge, however, is rarely possessed. The writer was acquainted with an eminent conveyancer who, in preparing his own will, purposely abstained from inserting a power to grant mining leases, because he thought it was well ascertained that there were no minerals under his land. Yet not three months elapsed after his death before a coal master offered to take a lease of some coal under the land; and the trustees were compelled to go to the court for power to grant it. In connection with this remedy

by act of parliament for imperfect conveyancing, we may here call attention to the act 23 & 24 Vict. c. 145.

(*l*) See the Improvement of Land Act, 1864 (27 & 28 Vict. c. 114), amending and consolidating the law relating to the improvement of lands by owners of limited interest.

(*m*) *E. g.* The land forming the site of the new law courts now in contemplation, or land taken for purposes of, or affected by fortification, under the Defence Act, 1860 (23 & 24 Vict. c. 160).

(*n*) The general act which contains the provisions under which this is done is the Lands Clauses Act, 1845 (8 Vict. c. 18).

Charities are, as has already appeared, within the scope of that protection afforded by the court of chancery to persons under disability as to the management of their affairs, and suits in which the attorney-general, as representing the sovereign, is the plaintiff (usually instituted at the relation or instigation of some private individual interested in the welfare of the charity), are common. But besides the jurisdiction of the court to investigate and control the affairs of a charity upon the institution of a suit, the legislature has provided more speedy and inexpensive modes of correcting abuses. By the act, usually called sir Samuel Romilly's Act (52 Geo. 3, c. 101), an application may be made, by the attorney-general acting *ex officio*, or by any two or more persons interested in the charity, with the consent of the attorney-general, to the court, praying for such relief as the nature of the case may require (*o*).

This summary jurisdiction of the court over charities has been much enlarged by the Charitable Trust Acts, 1853, 1855, and 1860 (*p*), which have made provision for most cases which experience has pointed out to require some more effectual or less costly remedy than previously existed. The details of these enactments would be out of place here.

The last of the special powers which have been conferred by act of parliament upon the court of chancery which we need notice, is the control which, by the Attornies' and Solicitors' Act (23 & 24 Vict. c. 127, amending some previous acts), the court exercises over solicitors.

(*o*) The operation of this act has been extended by judicial interpretation of a rather liberal nature to cases which would hardly appear at first sight to be within its scope; for instance, the authorising the sale of charity lands. See *Re Parkes' Charity*, 12 Sim. 329; *Re Overseers of Eccleshall*, 16 Beav. 297; *Re*

Ashton Charity, 22 Beav. 288. The act was passed in consequence of the former act, 43 Eliz. c. 4 (commonly called the Statute of Charitable Uses) having become obsolete and fallen into disuse.

(*p*) 16 & 17 Vict. c. 137; 18 & 19 Vict. c. 124; 23 & 24 Vict. c. 136.

Solicitors have always been, and are, considered as officers of the court, and therefore have always been subject to its authority in matters relating to their professional duty; but by the act just mentioned, peculiar facilities are given both to the client, for the purpose of ascertaining that he has been fairly dealt with by his professional adviser, and to the solicitor for obtaining payment of his costs.

We have thus illustrated, so far as our limits would allow, the subject of this chapter; but there remains one subject which, though not strictly a part of equitable jurisdiction, is so closely allied to it, that it may, with advantage, find its place at the close of a description of the power of the court.

Idiots and lunatics not as such within the jurisdiction of the court of chancery.

In the same category, of those who, like infants, require a *quasi* parental care, are persons who, being either idiots (*q*) or of unsound mind, are unable to take care of themselves or their property. We have already remarked that the sovereign, to whose care these fall, entrusts the charge to the chancellor. But the care of idiots and lunatics does not form part of the general jurisdiction of the court of chancery. The master of the rolls and the vice-chancellors have no jurisdiction whatever to interfere with the affairs of a lunatic, which would not be the case if such interference were considered to be part of the inherent jurisdiction of the court, because in that case all applications would be heard in the first instance by one of them. It is convenient, however, in this place, to mention the law relating to lunacy, because, the care of lunatics being part of the lord chancellor's duties (*r*), which duties are shared by the other judges of the court of appeal in chancery (*s*), it is closely allied in its operation, as well as

The care of them is part of the duties of the lord chancellor.

(*q*) An idiot is one who from his birth has shown no signs of reason. It is rarely that any one is legally proved to be an idiot, but rather the conclusion arrived at is that he is a lunatic, or of unsound mind,

though not from birth.

(*r*) See *ante*, p. 29.

(*s*) The Lords Justices, under a recent act (30 & 31 Vict. c. 87, s. 13) exercise these powers when sitting separately.

its nature, with much of the common jurisdiction of the court. Moreover, the court, in the exercise of its general jurisdiction, has, where a small property under its care belonged to a person who appeared to be incapable of taking care of himself, directed that the income should be applied for his maintenance (*t*).

The custody of an idiot and of his lands was formerly vested in the lord of the fee (*u*) (and therefore still, by special custom, in some manors the lord shall have the ordering of idiot and lunatic copyholders (*x*)); but, by reason of the manifold abuses of this power by subjects, it was at last provided by common consent, that it should be given to the king, as the general conservator of his people; in order to prevent the idiot from wasting his estate; and reducing himself and his heirs to poverty and distress (*y*). This fiscal prerogative of the king is declared in parliament by statute 17 Edw. 2, c. 9, which directs (in affirmance of the common law (*z*)) that the king shall have ward of the lands of natural fools, taking the profits without waste or destruction, and shall find them necessities; and after the death of such idiots he shall render the estate to the heirs: in order to prevent such idiots from aliening their lands, and their heirs from being disinherited.

By the old common law there was a writ *de idiota inquirendo*, to inquire whether a man be an idiot or not (*a*): which must be tried by a jury of twelve men: and, if they find him *purus idiota*, the profits of his lands and the custody of his person may be granted by the king to some subject, who has interest enough to obtain them. This appropriation of property to the use of the crown was long ago considered as a hardship upon private families:

(*t*) See Shelford on Lunacy, 214,
2nd edit.

(*u*) Flet. l. 1, c. 11, § 10.

(*x*) Dyer, 302; Hutt. 17; Noy.
27.

(*y*) F. N. B. 232.

(*z*) 4 Rep. 126. Memorand. Seacc.
20 Edw. 1. (prefixed to Maynard's
Yearbook of Edw. 11.) fol. 20, 24.

(*a*) F. N. B. 232.

and as early as in the 8 Jac. 1, it was under the consideration of parliament, to vest this custody in the relations of the party, and to settle an equivalent on the crown in lieu of it; it being then proposed that this and the slavery of the feudal tenures, which has since been abolished, should share the same fate (*b*). Yet few instances can be given of the oppressive exertion of it, since it seldom happened that a jury found a man an idiot *a nativitate* but only *non compos mentis* from some particular time; which formerly had an operation very different in point of law.

A man is not an idiot (*c*), if he has any glimmering of reason, so that he can tell his parents, his age, or the like common matters. But a man who is born deaf, dumb, and blind, is looked upon by the law in the same state with an idiot (*d*); he being supposed incapable of any understanding, as wanting all those senses which furnish the human mind with ideas (*e*).

A lunatic, or *non compos mentis*, is one who has had understanding, but by disease, grief, or other accident, has lost the use of his reason (*f*). A lunatic is indeed properly one that has had lucid intervals: sometimes enjoying his senses, and sometimes not, and that frequently depending upon the changes of the moon. But under the general name of *non compos mentis* (which sir Edward Coke says is the most legal name) are comprised not only lunatics, but persons under frenzies, or who lose their intellects by disease; those that *grow* deaf, dumb, and blind, not being *born* so; or such, in short, as

(*b*) 4 Inst. 203; Com. Journ. 1610.

(*c*) F. N. B. 233.

(*d*) Co. Litt. 42; Fleta, l. 6, c. 40.

(*e*) In *Yong v. Sant*, Dyer, 56 a, it was held that one who had become deaf, dumb, and blind by accident, not having been born so, was to be deemed *non compos men-*

tis. The presumption that a person deaf, dumb, and blind from his nativity is an idiot, is only a legal presumption, and is therefore open to be rebutted by evidence of capacity. (Chitty's Med. Jur. i. 301, 345).

(*f*) *Idiota a casu et infirmitate*. Mem. Scacch. 20 Edw. 1. (in Maynard's Yearbook of Edw. II.) 20.

are proved to be incapable of conducting their own affairs. To these also, as well as idiots, the king has always been guardian, but to a very different purpose. For the law always imagined that these accidental misfortunes might be removed; and therefore only constituted the crown a trustee for the unfortunate persons, to protect their property, and to account to them for all profits received, if they recover, or after their decease to their representatives. And therefore it was declared by the statute 17 Edw. 2, c. 10, that the king should provide for the custody and sustentation of lunatics, and preserve their lands and the profits of them for their use, when they came to their right mind; and the king should take nothing to his own use; and if the parties died in such estate, the residue should be distributed for their souls by the advice of the ordinary: of course now (by the subsequent amendments of the law of administration) the residue goes to their executors or administrators.

Formerly, also, there was a writ *de lunatico inquirendo*, upon which persons were ascertained to be lunatics, which was tried much like the writ *de idiota inquirendo*. These writs are now superseded by the modern methods which have been introduced and improved as experience has pointed out the most convenient and beneficial measures to be adopted. At the present time the whole care of lunatics is regulated by acts of parliament (*g*), both as to those who are so found, after solemn inquiry or inquisition, and those who, though of unsound mind, have not been so found by inquisition, either by reason of the expectation of their recovery entertained by their friends, or from their not being possessed of any property. Both private madhouses and public asylums erected for the various

(*g*) See the following acts:—8 & 9 Vict. cc. 100, 126 (which repealed a number of earlier acts), amended by 16 & 17 Vict. cc. 96, 97; 25 & 26 Vict. c. 111; 26 & 27 Vict. c.

110; and 28 & 29 Vict. c. 80. In these acts the word "lunatic" includes "every insane person and every person being an idiot or lunatic or of unsound mind."

counties are now visited and inspected by, and subject to, the control of public officers appointed for that purpose (*h*).

When it is necessary to prove a person a lunatic, so that a proper legal control may be exercised over both his person and property, application is made to the lord chancellor, and if allowed by him (or the lords justices of the court of appeal), the inquiry is conducted by certain officers called the masters in lunacy, either with or without the assistance of a jury, according as the lord chancellor may deem fit. As soon as the lunacy has been established, a committee of the person, and another of the estate, are appointed by his lordship, and a scheme is prepared for the management of the person and estate; this, when sanctioned by the judge, regulates the maintenance of the lunatic and the management of his estate. Every change that may be requisite afterwards is only made under an order of the same high authority (*i*).

(*h*) See the acts cited in preceding note. regulating the inquiries and all the other proceedings; and the Amendment Act, 25 & 26 Vict. c. 86.

(*i*) See the Lunacy Regulation Act, 1853 (16 & 17 Vict. c. 70),

CHAPTER VI.

A SUIT IN CHANCERY.

WE will endeavour, in this chapter, to exhibit to the reader a general view of the proceedings in a chancery suit, so as to enable one who is not familiar with the course of the court to understand the principal events which take place, their effects, and relative importance; but it will not be possible, within the limits to which we are confined, to give much account of the numerous rules which require to be observed in conducting the proceedings.

In the course of years, innumerable disputes have, as may be easily supposed, arisen as to procedure, and in order to prevent their recurrence in similar cases, and also to provide for the due management of business, rules have been from time to time laid down. Some of these, called the general orders of the court, have been promulgated by the chancellor, or more recently by the chancellor and other judges, acting for that purpose under legislative authority (*a*). These, not having been made merely for the purpose of deciding any particular case, are binding upon all the judges. Other rules have become established as rules of practice by being laid down in the course of deciding particular cases, and adopted subsequently by other judges as binding precedents. In the year 1852, The Improvement of Jurisdiction of Equity Act (*b*) was passed, and in the year 1860, all the then existing general orders were abrogated, and a new series was issued, which

General
orders of
the court.

(*a*) 15 & 16 Vict. c. 86, s. 63; *Short v. Roberts*, L. R. 2 Ch. 13.
and 23 & 24 Vict. c. 128. See (*b*) 15 & 16 Vict. c. 86.

consolidated and amended the former orders. These enactments and orders, with a few subsequent acts (c) and general orders and regulations, together with a vast collection of reported cases decided upon points of practice, now constitute the law of the court.

It would be tedious, and it is unnecessary for our purpose, to give any historical account of the various proceedings, when and how they originated, and how they gradually assumed their present form. We shall, therefore, confine our description to the practice as existing at the present time.

The bill. A suit in chancery is commenced by filing in the office of the clerk of records and writs in chancery a document called a bill (d). This bill, a model of which is given in the schedule of the consolidated orders above referred to, is a petition addressed to the lord chancellor in a particular form. At the head of it appear the names of the parties to the suit, then follows an address to the person holding the great seal, the terms of which are prescribed by the court upon every change of the custody of the seal, or alteration in the style of the person to whom it is committed. The description and address of the plaintiff are then stated. After this is set forth a statement of all the facts and circumstances, and the purport, or sometimes even the words of the documents, upon which the plaintiff intends to rely. In this part is introduced any inference of law or fact which the plaintiff thinks it advisable to state, and there sometimes is added that which the plaintiff conceives will be the defence, together with the matter which he thinks sufficient to avoid such defence. This stating part of the bill is succeeded by the prayer, in which the plaintiff asks for the particular relief

(c) 21 & 22 Vict. c. 27; 25 & 26 Vict. c. 42; 23 & 24 Vict. c. 149.

(d) When the Attorney-General, as representing the crown, is plaintiff, the document filed is called an information, not being a petition.

Informations are often, but not always, filed at the "relation" of some person who takes the risk as to costs. They must, however, always be sanctioned by the Attorney-General.

he thinks himself entitled to, always (*e*) concluding with a prayer for general relief. The bill must be signed by counsel (*f*). It is printed, and a printed copy is filed (*g*). On it there is an indorsement equivalent to a writ or command from her majesty to the defendant to cause an appearance to be entered in the court (*h*). When the bill has been filed, a copy of it is stamped by the clerk of records and writs, which is served on the defendant; and if there be more than one defendant, such a copy is served on each. If the defendant be out of the jurisdiction, the court, upon application of the plaintiff, showing where he probably may be found, will order service upon him abroad, giving him a reasonable time to appear (*i*).

If the defendant, having been duly served with the bill, do not enter an appearance, the plaintiff may enter an appearance for him, so as to be able to proceed with the suit. After the appearance of the defendant, the next step, if the plaintiff wishes, as he usually does, to examine the defendant, and thus elicit information in support of his case, is to file (*k*), and then serve interrogatories (*l*), in which the plaintiff puts to the defendant such questions relative to the subject matter of the suit as he thinks proper (*m*).

Appearance
of defend-
ant.

Interroga-
tories.

(*e*) Except when the bill is merely to obtain discovery, and not asking for any relief, a bill which, now that common law courts have the power of interrogating parties, is comparatively rare.

(*f*) Cons. Order, viii. 1.

(*g*) Cons. Order, ix. 3. In cases where time is of urgent importance, a written copy is allowed to be filed; but a printed copy must be filed within fourteen days afterwards. *Ib.* r. 4.

(*h*) For the form of the indorsement, see the schedule to 15 & 16 Vict. c. 86; and Cons. Order, ix. 2.

(*i*) Cons. Order, x. 7. This or-

der has been, after much discussion, decided to give a general power to the court, as stated in the text. See *Drummond v. Drummond*, L. R. 2 Ch. 32.

(*k*) The interrogatories must be filed within eight days after the time limited for appearance of the defendant who is to be interrogated. Cons. Order, xi. 2.

(*l*) A form of interrogation is given in schedule B. of the Cons. Orders.

(*m*) Usually the interrogatories follow the bill, and require the defendant to answer seriatim as to the truth of each allegation in the bill, with such additional interro-

Answer.

When interrogatories have been served, the defendant is bound to answer them within twenty-eight days (*n*), on pain of imprisonment; but the time will be readily extended on application to the court if a sufficient reason be given. The answer to the bill is the statement of the defendant made, on oath, in answer to the interrogatories; it usually constitutes the commencement of the defence to the suit: in it the defendant is bound to reply fully to every question in the interrogatories. But besides these replies, he may also state any facts which he thinks material to his defence. If he have not been interrogated, he may if he pleases, within a limited time (*o*), make a voluntary answer. An answer, like a bill, being an important part of the pleadings, must be signed by counsel; it is, like a bill, printed and filed. An answer is not however the only mode of defence.

Demurrer.

If any ground of defence is apparent on the bill itself, either from the matter contained in it, or from some defect in its frame or in the case made by it, the defendant may, instead of answering it, demur to it; and this is then the proper mode of defence. A demurrer is an allegation by a defendant which, admitting for the purpose of argument the matters of fact alleged by the bill to be true, shows that as they are therein set forth they are insufficient for the plaintiff to proceed upon, or to oblige the defendant to answer (*p*). The grounds of demurrer are various; the commonest is, that the subject of the suit is not within the jurisdiction of a court of equity, or, what is much the same thing, that there is not stated in the bill such a case as entitles the plaintiff to any discovery or relief in a court of equity: other grounds are, that the plaintiff is not entitled to sue by reason of some

gatories as may be calculated to elicit the truth. It is not essential, however, to follow this course. See *Marsh v. Keith*, 1 Dr. & S. 342.

(*n*) Cons. Order, xxxvi. 4.

(*o*) Fourteen days after the last day for service of interrogatories.

(*p*) Mitford's Pleadings in Chancery, 107.

personal disability, or want of interest on his part; or, although the plaintiff may have an interest in the subject-matter, and may be under no disability, and may have a good title to sue, yet that the defendant is not the proper person to be sued by the plaintiff, either from not having any interest in the subject-matter of the suit, or from his not owing any duty to the plaintiff. Another ground of demurrer is, that complete justice cannot be done without other persons than those made parties to the suit being before the court (*q*); and that the bill is therefore defective for want of parties, and ought not to proceed. Another, and the last ground of demurrer which we need here mention, is that of multifariousness. The court will not permit a plaintiff to demand by one bill several matters of different natures against several defendants, or even, where the demands are clearly distinct in their character, against one defendant. A defendant may, therefore, demur to a bill open to this objection (*r*).

When a demurrer is put in to the bill, and the plaintiff does not admit its validity, the case is set down for argu-

(*q*) The demurrer for want of parties was formerly a fruitful source of annoyance and expense. This has been much diminished by the alteration made by the legislature in the rules of the court (15 & 16 Vict. c. 86, s. 42; Cons. Order, vii. 1, 2). The old rule, requiring the presence of every person who was materially interested in the subject-matter of the suit, arose from the extreme anxiety of the court to do complete justice, and prevent future litigation. The strictness with which it was applied often led to great practical injustice, from the difficulty and expense of complying with it. This led to its relaxation in several classes of cases, mentioned in the act and the orders.

(*r*) For illustrations of the several kinds of demurrers, see Mitford on Pleadings, ch. ii. s. 2, p. 1, and also J. W. Smith's Notes thereto. The demurrer for want of equity is the most frequent, that for multifariousness the next. The skill of draughtsmen, however, in preparing bills, renders demurrers not very common; sometimes, however, the plan of filing a bill in order that it may be demurred to, is adopted as a convenient means of quickly obtaining the opinion of the court upon the construction of an instrument, upon which the plaintiff in such a case founds his claim. The parties in such a case usually acquiesce in the decision upon the demurrer.

ment before the court. If the court thinks the demurrer is well founded, the decision is equivalent to a dismissal of the bill, and so terminates the suit as regards the demurring defendant. Sometimes, however, the court, whilst holding the demurrer to be well founded, yet considers the circumstances to be such that it ought not to put an end to the suit, but give the plaintiff an opportunity of making some alteration in the statement of his case. The court then allows the demurrer, but gives leave to the plaintiff to amend his bill. In such case the plaintiff usually has to pay the costs which have been incurred by the defendant up to that time. If the demurrer is, in the opinion of the court, not well founded, it is overruled, and the suit is in the same condition as if it had not been put in, the defendant having, however, generally to pay the costs occasioned by it.

Plea.

A third method of defence is by plea. A plea is of the nature of an answer to the bill, but is of a special kind, having no reference to any interrogatories which may have been filed. It may be described as a statement of some simple ground of defence, which does not appear on the face of the bill, but which would if it were in the bill render it demurrable. The grounds of pleas are very much like those of demurrers. The object of them is to save the expense of examination of witnesses at large; therefore it is not every good defence in equity that is good as a plea, for where the defence consists of a variety of circumstances, it is not proper for a plea, as the court would be giving judgment on the case before it is made out by proof (s).

Pleas are not much favoured by the court, and except where the fact pleaded is a bankruptcy of the plaintiff or defendant, taking away the right to sue or liability to be sued, or some other equally simple fact, they are rarely resorted to, and still more rarely succeed.

(s) Mitford, 219.

If a plea succeeds, there is an end of the suit ; if it fails, the suit proceeds as if none had been put in.

If the defendant, not succeeding in either demurrer or plea, puts in an answer, the plaintiff next considers whether the answer contains sufficient replies to his interrogatories. If it does not, he excepts to the sufficiency of the answer ; ^{Exceptions to answer.} which is done by filing a formal statement of his objections, called the exceptions. The exceptions, which must show accurately wherein the answer is deficient, are then argued before the court ; and if they are allowed, the defendant has to put in a further answer. This process continues until the plaintiff has, in the opinion of the court, obtained a complete answer to his interrogatories.

A plaintiff, after seeing the answer, often finds that the allegations contained in his bill are either incorrect or insufficient fully to exhibit his case to the best advantage. He is allowed at that stage, therefore, to amend his bill by making such alterations in it as he thinks proper, with this restriction only, that he must not by amendment entirely alter the character of the suit. ^{Amendment of bill.}

He may also introduce by amendment any fact which has occurred subsequently to the filing of the original bill (*t*). A bill may be amended at other stages of the suit besides after answer, and the changes which may be introduced by way of amendment are many and various ; new parties may be added and former parties struck out ; even a party originally plaintiff may be made a defendant ; additional relief may be asked, and the former prayer altered. Even at the hearing of a cause in court amendments are allowed ; and the hearing will in such a case be postponed for a few days, in order that they may be made (*u*). An order is in every case obtained from the

(*t*) This was not allowed until the act 15 & 16 Vict. c. 86, s. 53. It could previously only be done by filing a new bill, called a supple-

mental bill. See Mitford, 62.

(*u*) See *Tasker v. Small*, 3 M. & Cr. 63 ; *Maughan v. Blake*, L. R. 3 Ch. 32.

court giving leave to amend; such an order will, before the defendant has put in his answer, be given as of course (*i. e.* without the defendant being allowed to oppose it), as often as the plaintiff pleases. After an answer has been put in, one order to amend only will be granted as of course, and any further order can only be obtained if the court, after hearing the defendant, thinks proper to allow it.

The plaintiff may file interrogatories, and require an answer to his amended bill if he pleases; these new interrogatories are confined, however, to the subject-matter of the amendments, but the same process for insisting upon a sufficient answer that applied to the original bill is repeated for the amended bill.

Examina-
tion of
plaintiff.

If the defendant wishes to examine the plaintiff in the same searching manner in which he has himself been examined, he may do so. Formerly in order to do this, he was obliged to file a second bill, *i. e.* institute a second suit, called a cross suit (*x*), but now a defendant may, as soon as he has put in a sufficient answer (if required to answer), file interrogatories for the examination of the plaintiff, prefixing to such interrogatories a concise statement of the subjects on which discovery is sought. The plaintiff is bound to answer such interrogatories, in like manner as the defendant was bound to answer the plaintiff's interrogatories.

When the defendant has answered in an unexceptionable manner, and the plaintiff no longer wishes to amend his bill, the latter carefully considers the answer, and if he finds that upon the answer alone, without further proof, there is sufficient ground for a final order or decree (which rarely happens in hostile suits), he is bound to proceed

(*x*) A cross suit is even now sometimes necessary for complete defence; for instance, when one defendant wishes to obtain discovery from a co-defendant. The

right to file a cross bill is expressly reserved by the statute 15 & 16 Vict. c. 86, s. 19, which first authorised these interrogatories on the defendant's part.

upon the answer without entering into evidence (*y*). In such a case the cause is set down on bill and answer, the answer being assumed in the argument to be true (*z*). Hearing on bill and answer.

If, however, the plaintiff thinks, as usually happens, that evidence beyond the admissions in the answer is necessary to support his case, or if the defendant has not been required to answer, and has not answered, then there are two distinct courses open to the plaintiff, which differ in their effects principally as to the mode in which the evidence is taken. The plaintiff may at once put the cause in issue, by filing what is called a replication (*a*), and is equivalent to traversing or denying *in toto* the statements in the answer. Or he may serve a notice of motion for a decree (*b*). These two modes of bringing the cause to a hearing we will consider separately, but before doing so it may be here mentioned, that if he has required an answer, but the defendant has neglected to put one in, the plaintiff, besides taking steps to imprison him for contempt in not answering, may file a traversing note, which is a declaration of his intention "to proceed with his cause as if the defendant had filed an answer traversing the case made by the bill" (*c*). Traversing note.

We will suppose now that the plaintiff has put the cause in issue by filing replication (*d*), he immediately gives notice that he has done so to the defendant, and each side then proceeds to verify his case by evidence. Replication.

In chancery, evidence is for the most part taken by affidavit, that is, by a written statement signed by the witness, to the truth of which he is sworn in the presence of certain officers of the court, (who are usually solicitors), appointed by the lord chancellor, and called "commissioners to administer oaths in chancery," of whom there are a great number residing in all parts of the kingdom. These affidavits when sworn are filed in the record Evidence.

(*y*) Cons. Order, xix. 1.

(*z*) *Ib.* 2.

(*a*) Cons. Order, xvii. 2.

(*b*) 15 & 16 Vict. c. 86, s. 15.

(*c*) Cons. Order, xiii. 1.

(*d*) Cons. Order, iii. 9.

and writ clerk's office, and copies of them for the use of the parties at the hearing are printed under the direction of the record and writ clerks (*e*). Sometimes, however, it is necessary, either from the refusal of a witness to make an affidavit, or for some other reason, to compel a witness to give evidence; when this is the case, the examination must of course be *vivâ voce*. The witness is served by the party who desires to examine him with a writ of subpoena, to appear before one of the examiners of the court, of whom there are two. He is then examined *ex parte*, no person having a right to be present at such examination except the party producing the witness, his counsel, solicitor, and agents. The examination is put into writing by the examiner, and is then treated as an affidavit (*f*).

All the evidence in chief must be taken in the above modes, within eight weeks after issue is joined (*g*), and the cross-examination of all witnesses is taken before the court at the hearing (*h*), unless the witness be, through age, infirmity, or for some other good reason satisfactory to the court, incapable of being so cross-examined (*i*), or unless the parties agree otherwise (*k*).

Besides the above modes of taking evidence, it is competent for any party, within fourteen days after issue joined, to apply for an order that all the evidence, both in chief and on cross-examination, upon some particular issue of fact, should be taken *vivâ voce* at the hearing (*l*).

(*e*) Gen. Order, 16 May, 1862, i.

(*f*) Gen. Order on Evidence, 5 Feb. 1861, r. 6. This order was made under the authority of an act (23 & 24 Vict. c. 128), passed for the purpose of giving effect to the recommendation of the chancery evidence commissioners.

(*g*) *Ib.* 5.

(*h*) *Ib.* 7. The onus of producing a witness to be cross-examined is

thrown upon the party whose witness he is. *Ib.* 19.

(*i*) *Ib.* 11.

(*k*) *Ib.* 10. There is also an exception in the particular case of a suit to perpetuate testimony. *Ib.* 16.

(*l*) Gen. Order, 5 Feb. 1861, r. 3. The introduction of oral evidence in court, either in chief or in cross-examination, is since the year 1860,

When an order of this kind has been made, the hearing, so far as concerns the issue of fact mentioned in the order, very much resembles a trial at *nisi prius* of a common law action, the judge taking both the part of judge and jury: a still greater resemblance, however, is allowed under the recent improvements of chancery practice, inasmuch as the court may, if it thinks fit, summon a jury to try before itself any question of fact which may arise in a suit. This trial by jury, however, will not, unless by consent of counsel on both sides, be directed until the cause has been actually brought to a hearing in the usual way (*m*), and it is completely in the discretion of the court whether a jury shall be summoned or not (*n*).

When the eight weeks allowed for taking evidence in the manner above explained have expired, or when any further enlarged time which the court may have allowed has expired, the evidence (except as to such issue, if any, as is to be tried before the court) is considered to be closed, and the cause is ripe for the hearing. The plaintiff accordingly sets it down in the registrar's book, and it comes on in its turn in court.

On hearing the cause, the court has, whatever may be the state of the evidence, or the mode in which parties have attempted to prove their cases, power to require the production and oral examination of any witness or party in the cause (*o*). This power is wholly discretionary on the part of the court, and will only be exercised with great care, and when the point on which further evidence is wanted is of great importance (*p*).

when the Improvement of Jurisdiction in Equity (15 & 16 Vict. c. 86) to which we have so often had occasion to refer, was passed.

(*m*) *George v. Whitmore*, 26 Beav. 557; *Bradley v. Bevington*, 4 Dr. 511.

(*n*) *Bovill v. Hitchcock*, L. R. 3 Ch. 417; and see *Fernie v.*

Young, L. R. 1 H. L. 63, where the principles and practice of the court, under the Chancery Amendment Act, 1858 (21 & 22 Vict. c. 27), and the Chancery Regulation Act, 1862 (25 & 26 Vict. c. 42), are fully explained.

(*o*) 15 & 16 Vict. c. 86, s. 39.

(*p*) Only, in fact, in those case

Notice of
motion for
decree.

We come now to the course of preparing evidence in the other case, viz., where the plaintiff moves for a decree. The notice of motion which he must give to the defendant states that one month from its date he will move the court for a decree (*q*). Before serving the notice of motion for decree, the plaintiff must file all affidavits which he thinks material for his purpose, and he must, at the foot of his notice of motion which he serves upon the defendant, set forth a list of the affidavits which he intends to use at the hearing (*r*). It follows from this, that if the plaintiff wishes to use the evidence of witnesses who refuse to make affidavits on his behalf, he must not proceed in this manner, but must file replication; because, before giving the notice of motion, he cannot subpoena any witnesses, and after doing so he is too late (*s*). On the hearing of a motion for decree, the answer, if there be one, is treated as an affidavit (*t*). When the defendant has received notice of motion for decree, he of course has an opportunity of seeing at the same time the evidence of his adversary, because he can obtain copies of the affidavits from the office. He must then, within fourteen days after service of the notice, file his affidavits in answer to the plaintiff's case (*u*). If he wishes to examine an unwilling witness, he has now an opportunity of doing so; he serves a subpoena on the witness to appear before an examiner of the court (*x*). The examination in this case would, it would

in which formerly the court used to send an issue to be tried by a jury before a common law judge, a practice which no longer exists. *Wilkinson v. Stringer*, 9 Hare, App. xxiii.; *Ferguson v. Wilson*, 36 L. J. Ch. 67.

(*q*) 15 & 16 Vict. c. 86, s. 14; Cons. Order, xxxiii. r. 4.

(*r*) *Ib.* and r. 5.

(*s*) *Coles v. Morris*, L. R. 2 Ch. 701.

(*t*) 15 & 16 Vict. c. 86, s. 15.

(*u*) Cons. Order, xxxiii. 6. The time is readily enlarged upon application to the court.

(*x*) This seems to be the effect of 15 & 16 Vict. c. 86, s. 40, as that section appears to apply to the examination of a witness by a defendant, after notice of motion for decree. See *Coles v. Morris*, L. R. 2 Ch. 701; and *Wigan v. Rowland*, 10 Hare, App. xviii.; *Wilhelm v. Reynolds*, 8 W. R. 625.

seem, be conducted in the presence of both parties, and the witness would be subject to cross-examination and re-examination (*y*).

When the defendant has completed his evidence and filed it, the plaintiff has an opportunity of filing further evidence in reply. Seven days are allowed for this (*z*), after which time no further evidence on either side can be put in to be used on the hearing of the motion for decree (*a*). But if either party wishes to cross-examine any witness whose affidavit has been filed, he may give a notice to the party on whose behalf the affidavit was filed of his desire to cross-examine, and such party must produce the witness before an examiner to be cross-examined, otherwise he cannot use the affidavit without special leave of the court (*b*).

The hearing of the motion for decree in most cases has the same effect as the hearing of the cause (*c*). The court can either make a decree exactly as if the cause had been brought to a hearing by joining issue, or it may dismiss the bill, and so put an end to the suit, to the overthrow of the plaintiff.

On comparing the method of taking evidence just described with that where the cause is brought to issue by replication, we see the great difference between them. When the cause is brought to issue, all

(*y*) 15 & 16 Vict. c. 86, ss. 31, 40. The words in section 40, that the witness shall be examined "in like manner, as such witness would be bound to attend and be examined with a view to the hearing of a cause," seem properly to be referred to s. 31, and not to the manner in which, under the later General Order of 1861, witnesses are examined with a view to the hearing of the cause.

(*z*) Cons. Order, xxxiii. 7. It would seem, that at this stage a plaintiff may summon an unwilling

witness before the examiner, under 15 & 16 Vict. c. 86, s. 40, but the evidence extracted from him must be strictly in reply to the defendant's evidence.

(*a*) *Ib.* r. 8.

(*b*) Gen. Order, 5 Feb. 1861, r. 19.

(*c*) There have been cases where the motion for a decree has been simply refused, without prejudice to the plaintiff bringing the cause to a hearing by filing replication. *Thomas v. Barnard*, 5 Jur. N. S. 31.

the evidence in chief is put in, without an opportunity being given to either party of seeing the evidence in chief of the other side: but each side, having power to obtain copies of all the evidence on the file, knows, before the hearing, all the evidence that is to be brought against him, and has an opportunity of considering the course to be adopted as to cross-examination; and he also has the great advantage of that cross-examination being in open court. The only exception to this previous knowledge is where there is to be a trial of an issue of fact before the court with a jury, or before the court sitting as both judge and jury; in which case the trial is, as we have already mentioned, conducted exactly like a trial at *nisi prius*.

In the case of motion for decree, on the other hand, each side has an opportunity of seeing his adversary's evidence before completing his own. There is also usually much less oral examination, and there is none whatever before the court.

We have now arrived at an important point in the history of a suit, that where a decree is made. A few remarks here arise upon the different characters which suits in chancery possess which lead to very different results as to the position which the litigation takes at the time a decree is made and its subsequent history.

There are many suits where the object is to obtain redress for some grievance, and as soon as the grievance is proved, and an order of the court made for its redress, the whole litigation is at an end. In an ordinary action at law, this is nearly always the case. The object for which a man brings an action is damages, and as soon as a verdict and judgment have been arrived at, the plaintiff has obtained everything which the court can give, nothing then remaining to be done in the action except to enforce, by the aid of the sheriff, the execution of the judgment. But in chancery it is often quite different; in a very large number of instances a single order can by no means fulfil the whole requirements of the suitors. It often happens,

particularly in those numerous suits where the court undertakes administrative business, that the action of the court must be continued for a great length of time, even for the lifetime of individuals. In these cases the decree, though in some respects the most important order which the court makes, is not the only order, and indeed is often not the order which decides the main questions in controversy between the parties. It often follows, therefore, that when the court makes a decree in accordance with the prayer of the bill, or in accordance with what it considers to be the rights of the parties, there remains still a great deal for the court to decide. The suit has a history subsequent to the decree which is as important as that of the earlier part. We will take two instances as illustrations. Suppose a man dies, leaving a number of debts, and also property: and a creditor thinks it necessary to require the estate to be administered by the court, the prayer which he makes is, that the court shall undertake the administration. The creditor in such a suit only takes care to satisfy the court that he has a claim, and that the persons who are made defendants are the persons in whom, by representation, either as executors or administrators, devisees, or heirs-at-law, the property of the deceased is legally vested.

The decree which is made in answer to such a prayer is that the estate shall be administered by the court; it also gives directions that certain inquiries shall be taken by the court, such as an inquiry what property the deceased was possessed of, where the property is and in whose possession, what debts the deceased owed, and who are entitled to the property subject to the payment of debts; and it directs that the property be applied in a due course of administration. The decree of course takes various forms to suit the particular circumstances of each case (*d*). It is obvious in this case that the decree is but

(*d*) The case described in the text is one for which the legislature has recently provided peculiar facilities, shortening the processes to be gone

the first step towards attaining the object of the suit. After the decree is made, all questions which arise as to the validity of claims of creditors, the construction of the will, the proofs of heirship, and so on, are decided by subsequent proceedings. Another case, which we may take, does not at first sight so clearly show why a final order may not be made at once. Suppose a mortgagee wish to exercise his right of foreclosing the equity of redemption of his mortgagor, that is, make himself absolute owner of the mortgaged property. It might seem that, if he proves by his evidence that the debt is still owing, and if, before the decree is made, the mortgagor does not pay, a final decree might be made. The court, however, according to its ancient customs, will not do this except in very special cases (*e*), or by consent of the parties. It always requires the accounts to be taken between the parties in a formal manner, and gives the mortgagor a very considerable period (always six months, and usually nine months), after the amount due has been ascertained, to pay the money: and it is only after proof of default in payment at the end of this time that it makes a final order barring the mortgagor from all interest in the property.

It will be seen that in this case the course adopted by the court, arises out of the extreme tenderness of the court in avoiding the slightest appearance of a harsh or oppressive exercise of strict legal rights.

Many other of the various complications which the court introduces into its decrees, also arise from the same anxious desire to do complete justice between the parties, and to insist upon the observance by the plaintiff seeking

through before the decree is made, (see 15 & 16 Vict. c. 86, ss. 45 and 47); but the decree, when made, is exactly of the same character as it used to be when the regular course of proceedings was travelled over.

(*e*) *E. g.* if the mortgaged property belong to an infant, and the

mortgage debt be more than its value, and it be proved clearly to the court that it would be for the advantage of the infant that the mortgagee should take the property in discharge of his debt. See Seton on Decrees, 685.

the aid of the court, of the duty which he owes to the defendant. It is with this view, also, that in every proceeding before the court, the costs incurred by the parties are paid in such manner as the court, which has always reserved to itself the most ample discretion upon this point, directs (*f*). A bill is often dismissed without costs, that is, each party has to pay his own costs, even though the plaintiff fails to establish his case: sometimes, even, a victorious party has to pay all the costs of both sides (*g*).

Before describing the course of events subsequent to the decree, we must here revert to the earlier period of the suit, in order to notice certain proceedings which, though often of the highest importance, yet are not part of the regular course of the suit. From what we have seen, it is obvious that in a hostile suit there often may be considerable delay before the cause can be heard and a decree made. It seldom happens in such a suit that the interval is less than three or four months; it is often much longer. But in many cases such a delay would be absolutely fatal to the plaintiff's hopes of relief, unless some earlier interference for his protection could be obtained; moreover the parties often require, as we have seen, particular orders relative to the conduct of the proceedings. The court, therefore, permits the parties at any stage of the suit to make applications to it. Such applications are made for various purposes, and may be made in several ways, either by summons obtained at the chambers of the judge, in which case the order is made by the judge in chambers or his chief clerk, after hearing the parties on the day when the summons is returnable; or

(*f*) Very different from the rule at law, where the defeated party invariably pays all the costs, except in the case of nominal damages.

(*g*) *E. g.*, in a simple redemption suit the plaintiff pays all the costs,

even though he succeeds in redeeming; though if an improper defence be set up, the defendant will be made to pay any extra costs occasioned thereby.

by motion in court; or, thirdly, by a formal petition addressed to the court.

The summons in chambers is usually adopted only for less important matters, and need not here be dwelt upon. Formal petitions, for matters of any consequence, are rarely presented before decree. Motions are the principal proceedings to which we now refer. A motion is a mere interlocutory application, and is sometimes made without giving any notice to the other side, but usually is made after giving two clear days' notice (*h*).

We do not intend here to enumerate all the different orders which the court will make upon motion; the general principle is, that if time is of such importance that great danger may ensue unless something be done before the cause can come to a hearing, the court will interfere and make such a temporary order as will prevent any such disastrous consequences; taking care, however, as far as possible, that if, upon the more thorough investigation of the facts which the complete evidence given at the hearing allows, it should turn out that the order made upon a motion was wrong, then it can restore the party against whom such order was obtained to as good a position as he was in previously.

If, therefore, the plaintiff asks for some order which may prove detrimental to the defendant, and, according to the evidence furnished upon the motion, there appears a possibility that the detriment so incurred would be an injustice to the defendant, the court will, as a price for its early interference, put the plaintiff upon terms to indemnify the defendant in case of the injustice being proved.

The most common of the important orders asked for on motion, are orders for injunctions. A few words may be

(*h*) Cons. Order, xxxiii. 2. If an order is obtained without giving notice, the other side may make a motion to discharge it; a motion made upon notice cannot be so discharged, as the merits are discussed, each side bringing forward its evidence.

said as to these, which will illustrate the proceeding by motion. An injunction is a writ issuing out of the court, commanding the person against whom it is addressed to abstain from doing some specified thing, upon pain of imprisonment for contempt of court. When the injunction is to restrain the defendant from proceeding with an action in a court of law, or some other court, it has been called a common injunction. When it restrains the defendant from doing some specified act, such as cutting down timber, digging mines, infringing a copyright or trade mark, it is called a special injunction. Formerly there was some difference between the practice in respect to the two kinds of injunctions, but now the distinction is unimportant (*i*). An injunction will not, before decree, be granted unless there is a special prayer in the bill for one. When it is intended to move for an injunction, a notice is served upon the defendant, stating that counsel will move the court on a named day, which must be one of the days which are set apart for motions (*k*). Each side then has an opportunity of filing affidavits in support of or against the motion, and this evidence can continue to be put in until the motion is heard. On the motion days the court asks each counsel in turn, according to seniority (*l*), whether he moves anything, and thereupon counsel makes the motion in the terms of the notice, and the argument ensues; but there is no previous formality of setting it down with the registrars, as is done when the cause is heard (*m*).

As soon as the order for an injunction is made, and

(*i*) 15 & 16 Vict. c. 86, s. 58.

(*k*) Special orders can in proper cases be obtained varying the practice, so as, for instance, to allow a motion to be brought on upon a day not one of the seal days.

(*l*) On the last day of term it is usual for the court to call upon the

utter bar before the queen's counsel.

(*m*) When an order made on motion is appealed against, a notice of the motion, by way of appeal, is lodged with the registrar, and it appears in the court paper, and is called on by the registrar.

notice of it given to the defendant, he is bound to obey it, although the writ itself be not issued till later.

Injunctions granted on motion before decree will, in accordance with what has been said, only be of a temporary character, generally until the hearing of the cause or further order. Sometimes, however, the discussion on the motion involves the whole merits of the suit; in such a case it is not uncommon for the parties to agree that the motion be treated as the hearing, all formalities being waived. To this the court readily consents, and in such a case a chancery suit may be instituted and ended within the space of a few days.

When there no longer remains any property under the control of the court, and no further question between the parties arising out of the certificates made in the inquiries in chambers, a suit in chancery comes to an end. It often happens, however, that before that consummation of events can be arrived at, proposals are made for a compromise. Of course if all the parties interested are *sui juris*, a compromise may be made at any time without the sanction of the court; but where, as in chancery so often is the case, infants or married women are interested, a compromise of doubtful rights can only be made with the permission of the court. This is given if, after a full disclosure of the facts, the court is satisfied that it will be for the real benefit of the person so under its protection that the compromise should be carried out (*n*), in which case alone will the compromise be binding.

The proceedings which take place after a decree is made will not detain us long. They consist usually of the following:—first, a prosecution of inquiries into facts, such as pedigrees, titles to property, and accounts. This is done in the chambers of the judges by their chief clerks: except where any point of difficulty arises, when the matter

(*n*) See, for the principles upon which compromises on behalf of infants will be supported or upset, *Brooke v. Lord Mostyn*, 2 De G. J. & S. 373.

is brought before the judge himself; for which purpose the judges, *i. e.* the master of the rolls and the vice-chancellors (not the judges of the court of appeal, for they only sit in court), attend in chambers in the afternoon after the rising of the court. As soon as these inquiries and accounts have been finished, a certificate is made out by the chief clerk stating the result (*o*). This forms the basis of fact for the subsequent steps in the cause, the principal of which is the further consideration. The party who has the carriage of the decree, *i. e.* the plaintiff in many though not all cases, sets down the cause to be heard upon further consideration, and it takes its place in the court paper, and is called on in court in its turn. It is on this second hearing, if we may so term it, that in administration suits the great contest upon the construction of wills or other similar documents takes place. The certificate informs the court of all the persons who can set up any claim; and each person mentioned in the certificate, and having a possible interest, appears at the hearing of the further consideration by his counsel and argues in support of his rights. It is to be noticed, that under the modern practice, a decree may be made in a suit for the administration or protection of property (*p*), with only a few of the persons interested being parties. But the court requires that all persons who by the chief clerk's certificate are shown to have any interest, or possible interest, should be served with notice of the decree, so that they may be bound by the proceedings, and that they may have an opportunity of appearing at the further consideration. A suit cannot in many cases be entirely disposed of even on the further consideration, because it may be

(*o*) As to the form of the certificate, see *Macintosh v. Great Western Railway*, 1 De G. J. & S. 443, in which the taking the accounts had occupied the chief clerk for two days in the week during nearly

six years. See S. C. 2 New Rep. 11.

(*p*) 15 & 16 Vict. c. 86, s. 42, where rules as to parties are laid down.

that persons who finally become entitled to the corpus of the estate which is being administered, may at that time not even be born. A suit in such cases necessarily remains in a quiescent state for years, the property being, however, retained under the protection of the court. When through the happening of events, such as the deaths of tenants for life, or the attainment of their majority by infants, it becomes necessary again to come to the court for an order; the usual mode of obtaining the order is by the presentation of a petition. A petition, as we have before said, may be presented at any stage of the suit, the most important petitions are those to which we now refer, the object of which is to obtain an order for the payment or transfer of money or stock in the hands of the accountant-general of the court, to which money or stock, by such events as above-mentioned, a new title has accrued to some person, or an order for conveyance of lands under similar circumstances.

Petitions state all the facts fully, though concisely. They are presented to the lord-chancellor (except in the case of one intended to be heard by the master of the rolls when it is presented to that judge), who receives them by his secretary. The petition is indorsed by the secretary with a direction that all parties should attend the court on a day named: this is called answering the petition. A copy of the petition is then served upon all parties interested, and on the proper day it appears in the court paper, and is called on in its turn. It must be supported by evidence which consists either of certificates previously made in the cause, or formal evidence of the facts upon which the title in question depends. The court exercises considerable caution in making the order, and herein consists the great value of an administration by the court (*q*).

(*q*) The court however necessarily relies, to no inconsiderable extent, upon the faith reposed in solicitors,

which, when abused, may lead to disastrous consequences. It therefore requires, under penalty of their

We have thus traced the history of a suit through all the stages of its progress: many of these by consent of the parties, or the natural requirements of the case, are often omitted, and the duration of the suit proportionately shortened. It only remains here to notice those cases where, by special legislative enactment, proceedings in chancery are taken either by a shortened form of suit, or by summary application without suit. Where the object of the suit is the administration of the personal estate of a deceased person, or even in certain cases his real estate, a decree for the administration may be obtained without filing a bill, but by a simple summons in chambers served upon the executor or administrator, or a devisee of real estate entrusted by the will with a power of sale (*r*).

From what we have recently said, in these cases the main value of the proceedings depends upon what takes place after decree, therefore it is a great advantage to avoid the delay and expense of the pleadings and other matters which in a regular suit precede the decree. In most of the other cases to which reference was made in the last chapter (*s*), the summary application to the court is made by a petition, entitled or headed with the name of the act, and of the name of the subject-matter of the proceeding. The only case in which a summary application of this kind is, according to the practice, made by a simple motion, is where the application is to rectify the register of a joint-stock company, under the 35th section of the Companies' Act, 1862. But sometimes the method of proceeding by summons, for the purpose of originating proceedings, is adopted, as in a case under the Charitable Trust Act, 1853 (*t*).

being struck off the rolls, the most rigid attention to honourable conduct on the part of solicitors. See *In re Collins*, 7 De G. M. & G. 558.

(*r*) See 15 & 16 Vict. c. 86, ss. 45, 47. Where the only question is

one of construction of a document or of title a special case may be stated under Sir George Turner's Act, 13 & 14 Vict. c. 35.

(*s*) Pages 79—82.

(*t*) Cons. Order, xli. r. 10.

CHAPTER VII.

THE SUPERIOR COURTS OF LAW.

FOLLOWING the plan indicated in the three preceding chapters, we shall next consider the superior courts of common law, their jurisdiction, and the proceedings in an action—of which subjects that first mentioned will, in anticipation of organic changes in this part of our system of judicature, be very briefly noticed.

By the ancient Saxon constitution there was only one superior court of justice in the kingdom; and that court had cognisance both of civil and spiritual causes: *viz.* the *wittena-gemote*, or general council, which assembled annually or oftener, wherever the king kept his Christmas, Easter, or Whitsuntide, as well to do private justice as to consult upon public business. After the Conquest the ecclesiastical jurisdiction was gradually diverted into another channel; and a court was established which sat in the king's hall, thence called by Bracton (*a*), and other ancient authors, *aula regia*, or *aula regis* (*b*). This court

(*a*) L. 3, tr. 1, c. 7.

(*b*) This court (says Mr. Millar, Eng. Gov. vol. ii. p. 108) corresponded in constitution and origin with that tribunal which, after the accession of Hugh Capet, was gradually formed out of the ancient parliament of France. It corresponded also with the *Aulic* council which, after the time of Otho the Great, arose out of the Diet of the German Empire. There is reason

to believe that in every considerable European kingdom the progress of the feudal system gave rise to a similar institution, which became detached from the national council by connivance, rather than by any positive appointment. The same writer remarks that, although in England the institution of the King's Council is commonly ascribed to William the Conqueror, yet this must be understood with

was composed of the king's great officers of state resident in his palace, and usually attendant on his person: such as the lord high constable and lord marshal, who chiefly presided in matters of honour and of arms; determining according to the law military and the law of nations. Besides these, there were the lord high steward, and lord great chamberlain; the steward of the household; the lord chancellor (*c*); and the lord treasurer, who was the principal adviser in all matters relating to the revenue. These high officers were assisted by certain persons learned in the laws, who were called the king's justiciars or justices; and by the greater barons of parliament, who sat in the *aula regia*, and formed a kind of court of appeal, or rather of advice, in matters of great moment and difficulty. All these in their several departments transacted secular business, criminal and civil, and likewise attended to matters connected with the revenue: whilst over all presided one special magistrate, called the chief justiciar (*d*) or *capitalis justiciarius totius Angliæ*; who was also the principal minister of state, the second man in the kingdom, and by virtue of his office guardian of the realm in the king's absence. This officer, from the plenitude of his power, grew at length both obnoxious to the people and dangerous to the government which employed him (*e*).

The *aula* or *curia regis* being bound to follow the king's household in his progresses and expeditions, the trial of common causes therein was found very burdensome to the subject. Wherefore king John, who dreaded also the power of the justiciar, readily consented to that article which forms the eleventh chapter of *Magna Carta*, and enacts, that "*communia placita non sequantur curiam*"

Origin of
the three
superior
courts of
law.

reference to the first appearance of that court as distinct from the legislative assembly, rather than with reference to its final and complete establishment.

(c) *Ante*, p. 32.

(d) *Ante*, p. 36.

(e) Spelm. Gl. 331, 2, 3; Gillb. Hist. C. P. Introd. 17.

regis, sed teneantur in aliquo loco certo." This certain place was established at Westminster, where the *aula regis* originally sat, when the king resided in that city; and to this article of the great charter we owe the institution of the court of common pleas, which has ever since remained stationary in Westminster Hall. In like manner, Philip the Fair, king of France, about the year 1302 fixed the parliament of Paris to abide constantly in that metropolis; which before used to follow the person of the king wherever he went, and in which he himself used frequently to decide the causes that were there depending; but all were then referred to the sole cognisance of the parliament and its learned judges. And thus also in 1495, the emperor Maximilian I. fixed the imperial chamber (which before always travelled with the court and household) to be constantly held at Worms, whence it was afterwards translated to Spire (*f*). Over the court of common pleas a chief judge and other justices were appointed; with jurisdiction to hear and determine all pleas of land, and wrongs merely civil between subject and subject. Which critical establishment of this principal court of common law, at that particular juncture and that particular place, gave rise to the inns of court in its neighbourhood; and, thereby collecting together the whole body of the common lawyers, enabled the law itself to withstand the attacks of the canonists and civilians, who laboured to extirpate and destroy it (*g*).

The *aula regia* being thus stripped of so considerable a branch of its jurisdiction, and the power of the chief justiciar being also considerably curbed by the great charter, the authority of both began to decline apace under the long and troublesome reign of Henry III. And the other several offices of the chief justiciar were under Edward I. (who new modelled the frame of our judicial polity) subdivided and broken up into distinct

(*f*) Mod. Un. Hist. xxiii. 396,
xxix. 467.

(*g*) *Ante*, vol. i. Introd. sect. i.

courts of judicature. A court of chivalry was erected, over which the constable and marshal presided; as did the steward of the household over another, constituted to regulate the king's domestic servants. The high steward, with the barons of parliament, formed an august tribunal for the trial of delinquent peers; and the barons reserved to themselves in parliament the right of reviewing the sentences of other courts in the last resort. The distribution of common justice, moreover, between man and man was thrown into so provident an order, that the great judicial officers were made to form a check upon each other: the court of chancery issuing writs framed in accordance with established precedents and under the great seal to the other courts (*h*); the common pleas being allowed to determine causes between private subjects; the exchequer managing the royal revenue; and the court of king's bench (*i*) retaining such portion of the jurisdiction of the *aula regis* as was not cantoned out to other courts, and particularly the sole cognisance of pleas of the crown or criminal causes. For pleas or suits are regularly divided into two sorts: "pleas of the crown," which comprehend all crimes and misdemeanors, wherein the crown (on behalf of the public) is the plaintiff; and "common pleas," which include all civil actions depending between subject and subject. The former of these were originally within the exclusive jurisdiction of the court of king's bench, the latter of the court of common pleas, which is a court of record, and is styled by sir Edward Coke (*k*) the lock and key of the common law; for therein only can real actions, as to which we shall hereafter inquire, be brought: and all other, or merely personal, pleas between man and man are likewise there determinable; though in regard to these latter the two other superior courts have now concurrent authority.

(*h*) *Ante*, p. 30.

(*i*) This court is called the queen's bench in the reign of a queen, and

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during the protectorate of Cromwell it was styled the upper bench.

(*k*) 4 Inst. 99.

The three superior courts of common law take rank, beginning with the lowest, in the following order: the exchequer, the common pleas, the queen's bench; and as to each of these, which is now presided over by six judges (*l*), some few additional details are subjoined.

Exchequer The exchequer, *scaccharium*, was so called from the chequered cloth, resembling a chess-board, which covered the table there: and on which, when certain of the king's accounts were made up, the sums were marked and scored with counters. It consists of two departments: the receipt of the exchequer, which manages the royal revenue, and with which these Commentaries have no concern; and the court or judicial part.

The court of exchequer seems first to have sat apart from the great council in the king's palace for the purpose of auditing his accounts, compelling payment of such feudal dues as were owing to him, and issuing writs applicable where the rights of the subject were withheld (as often happened in early times) by the officers or ministers of the crown. To this court all matters relating to the king's revenue were assigned for determination, and prior to the stat. of Rutland (10 Edward I.) it had acquired jurisdiction in some personal actions not at all affecting the rights or revenues of the crown. This appears, from the wording of the act in question, s. 3 of which enacts, that no plea shall be holden or pleaded in the exchequer unless it do specially concern the crown, its ministers or agents, in a matter appertaining to the king's exchequer. This statute, however, failed in consequence of an artifice in effecting its object, for it was held not to apply to suits between subjects who were debtors to the crown, and any suitor was permitted falsely to suggest in the process which he sued out that he was such a debtor, which at once gave the court jurisdiction (*m*).

(*l*) 31 & 32 Vict. c. 125, s. 11.

(*m*) The writ upon which proceedings in the court of exchequer

were grounded was called a *quominus*; and by it the plaintiff suggested that he was the king's

The court of exchequer is presided over by a lord chief baron and five puisne barons (*n*), and still retains, besides its jurisdiction over ordinary personal actions, peculiar and exclusive cognisance of matters of revenue (*o*)—matters involving the payment of stamp, succession, or other duties to government, and matters arising out of the laws regulating the customs and excise brought before it by information at suit of the attorney-general. If, therefore, an action touching any of the matters just specified should be brought in the court of queen's bench or common pleas, it will, on motion, be removed thence into the exchequer; indeed, it is a contempt of this latter court to proceed elsewhere in respect of any matter which lies within its own peculiar jurisdiction (*p*).

The court of exchequer formerly exercised an extensive equity jurisdiction, which, by statute 5 Vict. c. 5, s. 1, was for the most part (*q*) abolished and transferred to the court of chancery.

It must not be supposed that the king's council did, even in the earliest times, itself hear and determine the great majority of cases, civil or criminal, throughout the land; for, besides the local administration of justice by

Common
Pleas.

farmer or debtor, and that the defendant had done him the injury or damage complained of; *quo minus sufficiens existit*, by which he was the less able, to pay the king his debt or rent. (See Sellon's Pract. Introd. p. 32.) This fiction, as well as the form resulting from it, was abolished by stat. 2 Will. 4, c. 39.

(*n*) 31 & 32 Vict. c. 125, s. 11.

(*o*) See 22 & 23 Vict. c. 21. *Att.-Gen. v. Sillem*, Rep. ed. 1863.

(*p*) See *Mountjoy v. Wood*, 1 H. & N. 58; *Att.-Gen. v. Kingston*, 8 M. & W. 163.

(*q*) Except perhaps — for some

doubt exists upon this point—in revenue cases. *Att.-Gen. v. Halling*, 15 M. & W. 687; *Corp. of London v. Att.-Gen.*, 1 H. L. Ca. 440. See 1 Chitt. Arch. Pr. 11th ed. p. 2.

Suits on behalf of the Duke of Cornwall are instituted by way of information, filed by the attorney-general for the duchy, whose right to sue by information, in the nature of an English bill, on the equity side of the court of exchequer, was established in the case of *Att.-Gen. of the Prince of Wales v. St. Aubyn*, Wightw. 36.

the county or shire court, and by the hundred court (*r*), assizes were, so early as the reign of Hen. I., occasionally held by justices itinerant, and a practice was early resorted to of issuing special commissions of oyer and terminer at the suit of individuals when any extraordinary outrage had been committed. However, appeals lay in many cases to the king's council from decisions of the justices, and great expense and delay must have been thus occasioned to suitors who were compelled to resort to the supreme court. The hardship thus caused was partially remedied by the provision in *Magna Carta* already noticed (*s*), in virtue whereof the common pleas became stationary at Westminster. Nevertheless, suitors were still compelled to come thither for justice from very distant places, and to remedy this inconvenience the statute of Westm. II. (13 Edw. 1, c. 10) was passed, which enacted, that any person impleaded before the justices at Westminster, or at the assizes, might make a general attorney to sue for him. And to this statute it is thought that the habitual employment of attorneys of right in the courts at Westminster may properly be ascribed (*t*).

The court of common pleas has at this day a special cognisance of real actions (*u*). It is also the court of appeal from the decisions of revising barristers under the 6 & 7 Vict. c. 18; further it has some peculiar functions to discharge under the act for the abolition of fines and recoveries (*x*), and under "the Railway and Canal Traffic Act, 1854" (*y*).

Queen's
Bench.

The court of queen's bench (so called because the sovereign used formerly to sit there in person, or at all events was theoretically present there, the style of the court still being *coram ipsâ reginâ*), is (irrespective of appellate tribunals) the supreme court of common law in the

(*r*) *Post*.

(*s*) *Ante*, pp. 111, 112.

(*t*) See 1 Reeves, *Hist. Eng. L.*
p. 162.

(*u*) *Post*.

(*x*) 3 & 4 Will. 4, c. 74.

(*y*) 17 & 18 Vict. c. 31.

kingdom, consisting of a chief justice and five puisne justices (*z*), who are by their office the sovereign conservators of the peace, and supreme coroners of the land (*a*). Yet though the sovereign did occasionally, in early times, sit in this court (*b*), he did not, nor could he determine any cause or motion but by the mouth of his duly constituted judges (*c*).

The court of queen's bench, which (as we have said) is the remnant of the *aula regia*, is not, nor can it be, from its very nature and constitution, fixed to any certain place, but may follow the queen's person wherever she goes. It has indeed, for some centuries past, usually sat at Westminster, being an ancient palace of the crown; but might remove with the sovereign to York or Exeter, if she thought proper to command it. And we find that, after Edward I. had conquered Scotland, it actually sat at Roxburgh (*d*). And this moveable quality, as well as its dignity and power, are fully expressed by Bracton, when he says that the justices of this court are "*capitales, generales, perpetui, et majores; a latere regis residentes, qui omnium aliorum corrigere tenentur injurias et errores*" (*e*). And it is moreover especially provided in the *articuli super cartas* (*f*), that the king's chancellor, and the justices of his bench shall follow him, so that he may have at all times near unto him some that be learned in the laws.

The court of queen's bench takes cognisance both of criminal and civil causes; the former in what is called the

(z) 31 & 32 Vict. c. 125, s. 11.

(a) *Ante*, vol. i. p. 415.

(b) Dr. Henry says that he found no instance of any of our kings sitting in a court of justice before Edw. IV. "Edw. IV. (he adds) in the second year of his reign, sat three days together during Michaelmas term in the court of king's bench; but it is not said that he interfered in the business of the court; and as he was then a very

young man, it is probable that it was his intention to learn in what manner justice was administered, rather than to act the part of a judge." (Hist. vol. v. 382, 4to edit.)

(c) 4 Inst. 71.

(d) M. 20, 21 Edw. I.; Hale, Hist. C. L. 200.

(e) 1. 3, c. 10.

(f) 28 Edw. I. c. 5.

crown side or crown office; the latter in the plea side of the court. The jurisdiction of the crown side it is not our present business to consider; that will be more properly discussed in the ensuing Volume. On the plea side, or civil branch, this court had originally jurisdiction and cognisance of all actions of trespass or other injury alleged to be committed *vi et armis*; of actions for forgery of deeds, maintenance, conspiracy, deceit, and actions on the case which alleged falsity or fraud, all of which were deemed to savour of a criminal nature, and made the defendant liable in strictness to pay a fine to the crown, as well as damages to the injured party (*g*). The origin of the action on the case has been already stated (*h*), and of this form of action the court claimed cognisance, on the ground that it was for a trespass; and thus assumed jurisdiction over a large class of cases, comprising injuries consequential upon but not directly caused by tort. And gradually it still further extended its jurisdiction to actions of debt, covenant (*i*), and so forth, by allowing a plaintiff, in the first instance, to complain of a trespass against the defendant; and afterwards, when he had thus brought him into court, permitting the plaintiff to waive his charge of trespass, and to declare against the defendant, for some matter purely civil in its nature (*k*).

(*g*) Finch, L. 198; 2 Inst. 23; Dyversité de Courtes, c. *Bank le Roy*.

(*h*) *Ante*, p. 31.

(*i*) As to the above forms of action, *vide post*.

(*k*) To explain this more fully, the court amplified its jurisdiction in the manner following:—This court might always have held plea of any personal action, provided the defendant was an officer of the court; or in the custody of its marshal, or prison keeper; for a breach of the peace or any other offence. And in process of time it

began by a fiction to hold plea of all personal actions whatsoever, and has continued to do so for ages: it having been surmised that the defendant was arrested for a supposed trespass, which he never had in reality committed; and being thus in the custody of the marshal of the court, the plaintiff was held at liberty to proceed against him for any other personal injury: this surmise, of being in the marshal's custody, the defendant was not at liberty to dispute. This fiction was abolished by the stat. 3 Will. 4, c. 39.

The actual jurisdiction of the court of queen's bench is very high and transcendent. It has cognisance of all personal actions and actions of ejectment, with the various proceedings collateral and ancillary thereto. It is the principal criminal court in the realm. It keeps all inferior criminal jurisdictions within the bounds of their authority, and may either remove their proceedings to be determined there, or prohibit their progress below. It superintends all civil corporations in the kingdom. It commands magistrates and others to do what their duty requires, in every case where there is no specific remedy. It protects the liberty of the subject, by speedy and summary interposition. It is also a court of error (*l*) from the palatinate courts, and of appeal from those courts for the purposes of the undermentioned statutes (*m*).

The courts of assize and nisi prius, which I shall next notice, are derived out of, and act as collateral auxiliaries to, the foregoing. They are composed of two or more commissioners, who are twice at least, in every year, sent by the special commission of the crown, all round the kingdom (except London and Middlesex), to try by a jury, matters of fact which are in dispute. These judges of assize came into use in the room of the ancient justices in eyre, *justiciarii in itinere*; who were regularly established, if not first appointed, by the parliament of Northampton, A. D. 1176, 22 Hen. II. (*n*), with a delegated power from the king's great court or *aula regia*, being looked upon as members thereof; and they afterwards made their circuit round the kingdom once in seven years, for the purpose of trying causes (*o*). They were directed by *Magna Carta*,

Courts of
Assize and
Nisi Prius.

(*l*) 4 Inst. 214, 218, 223; 15 & 16 Vict. c. 76, s. 233.

(*m*) 17 & 18 Vict. c. 125, s. 102; 23 & 24 Vict. c. 126, s. 42.

(*n*) Seld. Jan. 1. 2, s. 5; Spelman, Cod. 329.

(*o*) Co. Litt. 293.—Anno 1261 *justiciarii itinerantes venerunt apud*

Wigorniam in octavis S. Johannis Baptistæ;—et totus comitatus eos admittere recusavit, quod septem anni nondum erant elapsi, postquam justiciarii ibidem ultimo sederunt. (Annal. Eccl. Wigorn. in Whart. Angl. Sacr. I. 495.)

c. 12, to be sent into every county once a year, to take or receive the verdict of the jurors or recognitors in certain actions, now abolished, but which were then called recognitions or assizes; the most difficult of which they were directed to adjourn into the court of common pleas, to be there determined. The itinerant justices were sometimes mere justices of assize or of dower or of gaol delivery, and the like; and they had sometimes a more general commission, to determine all manner of causes, being constituted *justiciarii ad omnia placita* (*p*): but the present justices of assize and *nisi prius* are more immediately derived from the statute Westm. 2, 13 Edw. 1, c. 30, which directs them to be assigned out of the king's sworn justices, associating to themselves one or two discreet knights of each county. By statute 27 Edw. 1, c. 4 (explained by 12 Edw. 2, c. 3,) assizes and inquests were allowed to be taken before any one justice of the court in which the plea was brought; associating to him one knight or other approved man of the county. And lastly, by statute 14 Edw. 3, c. 16, inquests of *nisi prius* might be taken before any justice of either bench (though the plea were not depending in his own court), or before the chief baron of the exchequer, if he were a man of the law: or otherwise before the justices of assize, so that one of such justices were a judge of the king's bench or common pleas, or the king's serjeant. The judges usually make their circuits in the respective vacations after Hilary and Trinity terms, and sit by virtue of four several commissions, issued to the clerks of assize, *viz.*, of oyer and terminer, gaol-delivery, assize, and association(*q*), in order that a sufficient supply of commissioners may never be wanting.

(*p*) Bract. l. 3, tr. 1, c. 11.

(*q*) By 3 Geo. 4, c. 10, it is enacted, that the commission may be opened on the succeeding day to that appointed; and if such succeeding day be a Sunday, or any other day of public rest, then on

the next following day, provided the opening of the commission on the appointed day was prevented by the pressure of business elsewhere, or by some unforeseen cause or accident. Upon each record brought from the court of exchequer before

Such being a brief *résumé* of the jurisdiction of our superior courts of law, three points connected with it are especially to be noticed:—

1. It is incumbent on each court to entertain and adjudicate upon any suit or matter regularly in contention before it; provided such suit or matter be not so frivolous as to involve a mere waste of time in its investigation; nor of such a nature, as to lead to enquiries inconsistent with public decency, or with the dignity of justice: for the rule stated by our ancient writers is *non recedant quærentes à curiâ regis sine remedio* (r).

2. Each of our superior courts is bound to keep within the limits of its jurisdiction. The consent of parties would not suffice to make operative a judgment of the court of common pleas on a crown case, or of the court of queen's bench in a real action; because the particular tribunal specified would have no power to entertain the case before it: the whole proceeding would be illusory, and lead to no result in legal contemplation (s).

3. It is not competent to parties, by any stipulation between themselves, to oust the jurisdiction of the courts. The precise meaning, however, of this expression "ousting the jurisdiction of the courts," deserves attention. It means, that when a cause of action has accrued, parties cannot by contract say that there shall not be jurisdiction to enforce damages in respect thereof. Parties cannot enter into a contract which gives rise to a right of action for the breach of it, and then withdraw such a case from the jurisdiction of the ordinary tribunals. Parties may, however, enter into a contract, such that no breach of it shall occur until after a reference has been made to arbitration (t).

the judges of assize, a separate commission was formerly issued by that court; but by stat. 2 & 3 Vict. c. 22, they are authorised on their circuits, without any commission, to try causes and take inquisitions

of pleas pending in the exchequer.

(r) 2 Inst. 405.

(s) See *Lawrence v. Wilcock*, 11 Ad. & E. 941.

(t) The distinction, *supra*, may be thus illustrated. If I covenant

With regard to the three rules stated as applicable to our superior courts of original or primary jurisdiction, we observe, that they rest on grounds of manifest policy and expediency. Our courts cannot refuse to listen and do justice to a suitor—who in a respectful and becoming manner, and with due regard to the recognised method of procedure, brings before them his complaint. Our courts cannot assume and exercise jurisdiction, even by consent of parties, beyond those limits within which alone they have been authorised and commissioned to do justice. Lastly, it is not compatible with the dignity of our superior courts, that their jurisdiction should be set aside.

Appellate
courts,

The briefest allusion will here suffice to our appellate courts, one principal use of which is to prevent the law from being changed. Were there no such superior tribunals, it would be easy for judges, by construction and interpretation, to change even a written law; and yet more easy would it be for them to change our customary unwritten law, which depends upon usage solely (*u*).

Exchequer
chamber,

The court of exchequer chamber derives its origin from the stats. 31 Edw. 3, st. 1, c. 12 (*x*), and 27 Eliz. c. 8, and was first established to hear and determine causes brought

with A. to do particular acts, and make default, and afterwards it is covenanted between us that any question arising as to breach of covenants shall be referred to arbitration, that latter covenant does not prevent the covenantee from bringing an action. A right of action having accrued, it would be against the policy of the law to give effect to an agreement that such a right should not be enforced through the medium of the ordinary tribunals. But if I covenant with A., that if I do, or omit to do a certain act, I will pay to him such a sum

as T. S. shall award as the amount of damage sustained by him, then until T. S. has made his award, and I have omitted to pay the sum awarded, my covenant has not been broken, and no right of action has arisen against me. Nor does the policy of the law prevent parties from so contracting. Judgment of Lord Cranworth, C., *Scott v. Avery*, 5 H. L. Ca. 811; *Lowndes v. Earl of Stamford*, 18 Q. B. 425.

(*u*) *Barnardiston v. Soame*, 6 St. Tr. 1094, 1095.

(*x*) By which enactment it was originally erected, as above stated,

before it by writ of error, from the common law side of the exchequer. The jurisdiction and constitution of this court were, however, materially altered by the stat. 11 Geo. 4 & 1 Will. 4, c. 70, s. 8, which enacted, that writs of error upon any judgment given by the court of king's bench, common pleas, or exchequer, should thereafter be made returnable only before the judges, or judges and barons, as the case might be, of the other two courts in the exchequer chamber.

Some additional duties have been imposed on this court, by the Common Law Procedure Act, 1854 (y).

Side by side with the court of exchequer chamber may be placed, a court quite differently constituted, the jurisdiction of which is also different, *viz.*, the judicial committee of the privy council. This court, so far as its common law jurisdiction is concerned, besides some peculiar duties in respect of patents and copyright, entertains appeals from our colonies and dependencies; and when it has come to a decision upon any case submitted to it, reports its opinion to the sovereign for approval and confirmation (z).

From the court of exchequer chamber, a writ of error lies to the house of peers, which is the supreme court of judicature in the kingdom, having at present no original jurisdiction over causes, but jurisdiction only upon appeals and writs of error, to rectify any injustice or mistake of the law, committed by the court below. To such authority this august tribunal succeeded of course, upon the dissolution of the *aula regia*. For, as the barons of parliament were constituent members of that court, and the rest of its jurisdiction was dealt out to other tribunals, over which the great officers who accompanied those barons were respectively delegated to preside, it

to hear causes brought from the court of exchequer.

(y) Sect. 36.

(z) The statutes relating to the

constitution of the judicial committee of the privy council, and its jurisdiction, are collected in M'Pherson's P. C. Prac. App.

followed, that the right of receiving appeals, and superintending all other jurisdictions, still remained in the residue of that noble assembly, from which every other great court was derived (*a*). The house of lords is, therefore, in all home causes, the last resort, from whose judgment no further appeal is permitted. Those members of the house, who alone take part in the hearing of appeals, are, conformably to the established practice, peers who have previously discharged important judicial functions, and bring therefore, to the consideration of questions submitted to them, the very highest attainable amount of legal knowledge, experience, and wisdom. Moreover, in difficult cases, they refer themselves to, but are in no degree bound by, the opinions of the judges, who are summoned by writ to advise them.

The house of lords recognizes and conforms to its own prior decisions, which can only be affected by act of parliament (*b*). If, indeed, a precedent found amongst the decisions of this tribunal were deemed objectionable, such judgment would probably be treated as a binding authority, in no case, and under no circumstances, differing or distinguishable from those to which it had been applied: so that, practically, its operation would be restricted within very rigid limits.

(*a*) As to the appellate jurisdiction of the house of lords, see also stats. 14 Edw. 3, c. 5; 17 & 18 Vict. c. 125, s. 36.

(*b*) *Tommeys v. White*, 3 H. L. Ca. 49; *Wilson v. Wilson*, 5 *Id.* 40, 63; *Att.-Gen. v. Dean, &c. of Windsor*, 8 *Id.* 369.

CHAPTER VIII.

JURISDICTION OF THE SUPERIOR COURTS OF LAW.

WRONGS AFFECTING THE PERSON—REPUTATION—LIBERTY AND RELATIVE RIGHTS.

THE jurisdiction exercised by our superior courts of common law will in this and some ensuing chapters be considered; and in treating of it I shall at first confine myself to such wrongs and breaches of contract as may be committed in the mutual intercourse between subject and subject: which the sovereign, as the fountain of justice, is officially bound to redress in the ordinary forms of law: reserving such injuries or encroachments as may occur between the crown and the subject, to be considered hereafter, since the remedy in such cases is generally of a somewhat peculiar and eccentric nature.

Now, since all wrong may be considered as merely a privation of right, the plain natural remedy for every species of wrong is the being put in possession of that right, whereof the party injured is deprived. This may either be effected by a specific delivery or restoration of the subject-matter in dispute to the legal owner; as when lands or personal chattels are unjustly withheld or invaded: or, where that is not a possible, or at least not an adequate remedy, by making the sufferer a pecuniary satisfaction in damages; as in case of assault, or breach of contract, to which damages the party injured has acquired an incomplete or inchoate right, the instant he receives the injury, or has to complain of the breach of contract; though such right be not fully ascertained till damages are assessed by the intervention of the law. The mode whereby this remedy is obtained, is in general a

suit or action defined by the Mirror (*a*) to be "the lawful demand of one's right:" and a right of action is, according to Bracton and Fleta, using the words of Justinian (*b*), *jus prosequendi in judicio quod alicui debetur*.

The Romans early introduced set forms for actions and suits in their law, after the example of the Greeks; and made it a rule, that each injury should be redressed by its proper remedy only. "*Actiones*," say the pandects, "*compositæ sunt, quibus inter se homines disceptarent: quas actiones, ne populus prout vellet institueret, certas solennesque esse voluerunt*" (*c*). The forms of these actions were originally preserved in the books of the pontifical college, as choice and inestimable secrets; till one Cneius Flavius, the secretary of Appius Claudius, stole a copy and published them to the people (*d*). The concealment was ridiculous: but the establishment of some standard was undoubtedly necessary, to fix the true state of a question of right; lest in a long and arbitrary process it might be shifted continually, and be at length no longer discernible. Or, as Cicero expresses it (*e*), "*sunt jura, sunt formulæ, de omnibus rebus constitutæ, ne quis aut in genere injuriæ, aut ratione actionis, errare possit. Expressæ enim sunt ex uniuscujusque damno, dolore, incommodo, calamitate, injuriâ, publicæ a prætore formulæ, ad quas privatu lis accommodatur.*"

Three kinds
of actions.

With us in England the several suits, or remedial instruments of justice, are distinguished into three kinds; actions personal, real, and mixed.

Personal
action.

A personal action is that whereby a man claims a debt, or seeks to recover damages for breach of contract, or of some personal duty: and likewise, whereby a man claims a satisfaction in damages for some wrong done to his person or property. The former is, in general, founded on contract, the latter upon tort, as in the Roman law we

(*a*) C. 2, s. 1.

(*b*) Inst. 4, 6, pr.

(*c*) Dig. 1, 2, 2, s. 6.

(*d*) Cic. pro Muræna, s. 11; De Orat. 1, 1, c. 41.

(*e*) Pro Qu. Roscio, s. 8.

read of "*actiones in personam, quæ adversus eum intenduntur, qui ex contractu vel delicto obligatus est aliquid dare vel concedere*" (f).

A real action was so called, because it concerned real Real action. property only: it is now of rare occurrence, by reason of enactments which will be hereafter noticed.

A mixed action partakes of the nature of the other two, Mixed action. for therein some real property is demanded, and personal damages also may often be recovered.

To one or other of the above three heads may every species of remedy by suit or action in a court of common law be referred. But in order effectually to apply the remedy, it is first necessary to ascertain the complaint. I proceed therefore now to enumerate the several kinds, and to enquire into the respective natures of such private wrongs and breaches of contract as are of practical concern; for to enumerate every infraction of right would be impossible.

In treating this subject, I shall adopt the same method that was pursued with regard to the distribution of rights: for as wrongs are nothing else but an infringement or breach of those rights, which we have before laid down and explained, it will follow that this negative system, of wrongs, must correspond and tally with the former positive system, of rights. As therefore, we divided (g) rights into those of persons, and those of things, so we must make the same general distribution of injuries into such as affect the rights of persons, and such as affect, directly or indirectly, the rights of property.

The rights of persons, we may remember, were distributed into absolute and relative: absolute, which were such as appertained and belonged to private men, considered merely as individuals, or single persons; and relative, which were incident to them as members of society, and connected to each other by various ties and relations (h).

(f) Inst. 4, 6, 15.

(h) Vol. i. p. 147.

(g) Vol. i. chap. i.

And the absolute rights of each individual were defined to be : I. The right of personal security : II. The right of personal liberty : and, III. The right of private property⁽ⁱ⁾ ; so that the wrongs or injuries affecting them, must consequently be of a correspondent nature.

I. Injuries affecting personal security.

I. Injuries which affect the personal security of an individual, are either against his life, his limbs, his body, his health, or his reputation.

1. Affecting life.

1. With regard to injuries affecting the life of man, they do not, except as noticed at page 150, fall under our present contemplation ; being one of the most atrocious species of crimes, the subject of the next volume of our Commentaries.

2 & 3. Affecting the limbs or body.

2, 3. The two next species of injuries, affecting the limbs or bodies of individuals, I shall consider in one and the same view. And these may be committed : (1.) By assault ; which is an attempt or offer to beat another, without touching him : as if one lifts up his cane, or his fist, in a threatening manner at another ; or strikes at him, but misses him ; this is an assault, *insultus*, which Finch (*k*) describes to be “an unlawful setting upon one’s person.” This is an inchoate violence ; and therefore, though no actual suffering be proved, yet the party injured may have redress by action of trespass ; wherein he may recover damages as a compensation for the injury. (2.) By battery ; which is the unlawful beating of another. The least touching of another’s person wilfully, or in anger, is a battery ; for the law cannot draw the line between different degrees of violence, and therefore totally prohibits the first and lowest stage of it ; every man’s person being sacred, and no other having a right to meddle with it, in any the slightest manner. Battery is, however, in some cases, justifiable or lawful ; as where one who has authority, a parent or master, gives moderate correction to his child,

Assault.

Battery.

(i) Vol. i. p. 153.

(k) Finch, L. 202.

his scholar, or his apprentice. So also on the principle of self-defence: for if one strikes me first, or even only assaults me, I may strike in my own defence; and, if sued for doing so, may plead *son assault demesne*, or that it was the plaintiff's own original assault that occasioned mine. So likewise in defence of my goods or possession: if a man endeavours to deprive me of them, I may justify laying hands upon him to prevent him; and in case he persists with violence, I may proceed to beat him away (*l*). Thus too in the exercise of his office, a churchwarden or beadle may lay hands upon another to turn him out of church, and to prevent his disturbing the congregation (*m*). And if sued for this or the like battery, he may set forth the whole case, and plead that he laid hands upon the plaintiff gently, *molliter manus imposuit*, for such purpose. On account of these causes of justification, battery is defined to be the unlawful beating of another; for which the remedy is, as for assault, by action of trespass, wherein adequate damages are recoverable.

A battery may be aggravated by wounding or mayhem, which, according to its strict technical meaning, consists in violently depriving another of the use of a member proper for his defence in fight (*n*). Any bodily hurt, whether caused by direct violence, or resulting from negligence, is, if adequate ground of excuse or justification be wanting, actionable. The nature of such an injury will hereafter be sufficiently exemplified.

4. Injuries, affecting a man's health, may be constituted by selling him bad provisions (*o*), or wine (*p*); by the exercise of a noisome trade, which infects the air in his neighbourhood; or by the neglect or unskilful manage-

4. Affecting health.

(*l*) 1 Finch, L. 203.

(*m*) 1 Sid. 301. *Burton v. Hen-son*, 10 M. & W. 105.

(*n*) Finch, L. 204; 1 Hawk. P. C. 107. For assault, battery, wounding, or mayhem, an indictment may

be brought, *post*, vol. iv., pp. 239, 240.

(*o*) See *Burnby v. Bollett*, 16 M. & W. 644.

(*p*) 1 Roll. Abr. 90.

ment of his physician, surgeon, or apothecary. *Mala praxis*, indeed, may constitute an offence at common law, whether it be for curiosity and experiment, or by neglect; and is especially reprehensible, because it breaks the trust which the party had placed in his physician, and tends to the patient's destruction (*q*). Thus also, in the Roman law (*r*), neglect and want of skill in physicians or surgeons, "*culpe adnumerantur, veluti si medicus curationem dereliquerit, male quempiam secuerit, aut perperam ei medicamentum dederit.*" The above are wrongs or injuries unaccompanied by force, for each of which there is a remedy in damages by action on the case, a remedy available for a personal wrong or injury without force. In very early times methods were prescribed, and forms of actions settled, for redressing those wrongs, which most usually occur, and in which the very act itself is immediately prejudicial or injurious to the plaintiff's person or property, as battery, non-payment of a debt, detaining one's goods or the like; and where any special consequential damage arose, which could not be foreseen and provided for in the ordinary course of justice, the party injured was allowed, both at common law and by the statute of Westm. 2, c. 24, to bring a special action on his own case, by a writ formed according to the peculiar circumstances of his own particular grievance (*s*). For wherever the common law gives a right or prohibits an injury, it also gives a remedy by action (*t*); and therefore, wherever a new injury is done, a new method of remedy must be pursued. And it is a settled distinction, that where an act is done which is in itself an immediate injury to another's person, there the remedy is usually by an action of trespass; but where there is no act done, but only a culpable omission; or where the act is not immediately injurious, but only by consequence and collaterally; there no action of trespass

(*q*) Lord Raym. 214; *post*.

(*r*) Inst. 4, 3, 6, & 7.

(*s*) *Ante*, p. 39.

(*t*) *Ashby v. White*, 2 Lord Raym. 953.

will lie, but an action on the special case, for damages consequent on such omission or act (*u*).

5. Lastly, injuries affecting a man's reputation or good name may be constituted, 1st, by malicious, scandalous, and slanderous words, tending to his damage and derogation. As if a man maliciously and falsely utter any slander or false tale of another; which may either endanger him in law, by impeaching him of some crime, as to say that a man has poisoned another, or is perjured (*x*); or which may exclude him from society, as to charge him with having an infectious disease (*y*), or which may impair or hurt his trade, profession, or livelihood, as to call a tradesman a bankrupt, a physician a quack, or a lawyer a knave (*z*). It is said, that formerly no actions were brought for words, unless the slander was such as (if true) would endanger the life of the object of it (*a*). But too great encouragement being given by this lenity to false and malicious slanders, it is now held that for scandalous words of the several species before-mentioned, (that may endanger a man by subjecting him to the penalties of the law, may exclude him from society, or may impair his trade or profession,) an action on the case will lie, without proving any particular damage to have happened. But with regard to words that do not thus apparently, and upon the face of them, import such defamation as will of course be injurious, it is necessary that the plaintiff should aver some particular damage to have happened, and any defamatory or disparaging words producing damage are actionable. If I say that such a clergyman is a bastard, he cannot for this bring any action against me, unless he can show some special loss by it; in which case he may maintain his action against me, for saying he was a

(*u*) Compare *Ashby v. White*,
supra; *Scott v. Shepherd*, 2 W.
Bl. 892; *Chapman v. Pickersgill*,
2 Wils. 146; per Ashhurst, J.,
Pasley v. Freeman, 3 T. R. 63;

Winsmore v. Greenbank, Willes, 577.

(*x*) Finch, L. 185.

(*y*) Com. Dig. Act. Def. (D. 28).

(*z*) Finch, L. 186.

(*a*) 2 Vent. 28.

bastard, *per quod* he lost the presentation to such a living (*b*).

Words spoken in derogation of a peer, judge, or other great officer of the realm, were formerly called *scandalum magnatum*, and were held to be especially heinous (*c*): and though such as would not be actionable in the case of a common person, yet when spoken in disgrace of these high and respectable characters, were held to amount to an atrocious injury; which was redressed by an action on the case founded on several ancient statutes (*d*); as well on behalf of the crown, to inflict punishment on the slanderer, as on behalf of the party, to compensate him by damages for the injury sustained. The action for *scandalum magnatum* is now obsolete, but words tending to scandalize a magistrate, member of parliament, or person in an eminent position, or in a public trust, are reputed to be in general more highly injurious than when spoken of a private man, and may render the individual who has promulgated the slander punishable on criminal information (*e*).

Mere scurrility, or opprobrious words, without damage, will not support an action; neither will words of heat and passion do so, if productive of no ill consequence: nor are words spoken in a friendly manner, as by way of advice, admonition, or concern, without any tincture or circumstance of ill will, and under circumstances such as will be presently indicated (*f*), actionable. Neither (as was formerly hinted (*g*)) do reflecting words made use of by counsel in legal proceedings, and pertinent to the cause in hand, or made use of by the judge (*h*), constitute a sufficient cause of action for slander. Also if the defendant

(*b*) *Davis v. Gardiner*, 4 Rep. 16.

(*c*) 1 Ventr. 60.

(*d*) See Stats. Westm. 1; 3 Edw. 1, c. 34; 2 Ric. 2, c. 5; 12 Ric. 2, c. 11.

(*e*) *Ex parte Chapman*, 4 Ad. & E. 773; *Ex parte Duke of Marl-*

borough, 5 Q. B. 955; *Reg. v. Gregory*, 8 Ad. & E. 907.

(*f*) *Post*, p. 134.

(*g*) *Ante*, p. 25.

(*h*) *Scott v. Stansfeld*, 37 L. J. Ex. 155.

be able to justify, and prove the words to be true, no action will lie (i), even though special damage has ensued: for then it is no slander or false tale. Thus, if I can prove the tradesman a bankrupt, the physician a quack, or the lawyer a knave, this will furnish a defence to their respective actions: for though there may be damage accruing from it, yet, if the fact be true, it is *damnum absque injuriâ*; and where there is no injury, the law, as a general rule, gives no remedy. And this is agreeable to the reasoning of the Roman law (k): "*cum qui nocentem infamat, non est æquum et bonum ob eam rem condemnari; delicta enim nocentium nota esse oportet et expedit.*"

The repeating of a rumour which is slanderous is not, however, justifiable (l). And falsely and maliciously to slander another man's title, by spreading such injurious reports, as, if true, would deprive him of his estate, or tend to cut down the extent of title to it, is actionable, provided any special damage accrues to the proprietor thereby; as if he loses an opportunity of selling the land (m).

2ndly. A second way of affecting a man's reputation is ^{2ndly.} by the maliciously publishing of a printed or written libel, ^{Libel.} picture, sign, or the like; which sets him in an odious, contemptible, or ridiculous light, and thereby diminishes his reputation (n). A libel, as we shall hereafter see, is indictable (o); it is also actionable, without proof of special damage, and in an action which is to compensate the plaintiff by pecuniary damages for the wrong done him, the defendant may, as in an action for words spoken, justify by showing the truth of the facts which he has alleged and published. The publication of a libel may be evidenced in various ways, as by reading it aloud, by selling it, or distributing it gratis, or by sending it through

(i) 4 Rep. 13 b.

(k) Dig. 47, 10, 18.

(l) *Watkin v. Hall*, L. R. 3 Q. B. 396.(m) *Pater v. Baker*, 3 C. B. 831.(n) *Du Bost v. Beresford*, 2 Camp.511; *Anon.* 11 Mod. 99. *The Case of Libels*, 5 Rep. 125 a.(o) *Post*, vol. iv.

the post, or otherwise, to a third person (*p*). Such publication is presumed to have been malicious, though it is competent to the defendant to rebut the inference of malice by proving that the libel was published on an occasion or under circumstances which would, on grounds of public policy, justify the publication, *ex. gr.* in giving the character of a servant (*q*). But the counter presumption which thus arises that the words were not maliciously spoken, may be rebutted by proof of express malice on the part of the defendant (*r*).

A communication disparaging to the character (*s*), and *primâ facie* libellous, will be privileged, when made *bonâ fide* by the defendant, in the performance of some social or moral duty, or in the conduct of his own affairs, and with a fair and reasonable hope of protecting his own interest in a matter which concerns it, or where there is a corresponding interest in the party who receives the communication (*t*); words spoken by a member of parliament in his place are not actionable (*u*), nor is a fair, correct, and *bonâ fide* report of proceedings in a public court (*x*), nor reasonable comment on a matter of public interest and concern (*y*); neither is a criticism, if it be fair, and do

(*p*) *R. v. Burdett*, 4 B. & Ald. 126, 143, 160; *Wenman v. Ash*, 13 C. B. 836.

(*q*) As to which Chambre, J., in *Rogers v. Clifton*, 3 B. & P. 594, said, "I take the law to be well settled, that where a master is applied to for the character of a servant, the former is not called upon in an action to prove the truth of any aspersions thrown out by him against the latter; but that it lies upon the servant to prove the falsehood of such aspersions. In such case, the master is justified, unless the servant prove express malice." See also *Taylor v. Hawkins*, 16 Q. B. 321, and cases there cited;

Somerville v. Hawkins, 10 C. B. 583.

(*r*) *Bromage v. Prosser*, 4 B. & C. 247; *Jackson v. Hopperton*, 16 C. B. N. S. 829.

(*s*) *Fray v. Fray*, 17 C. B. N. S. 603; *Walker v. Brogden*, 19 *Id.* 65.

(*t*) *Whiteley v. Adams*, 15 C. B. N. S. 392; *Judgm. Toogood v. Spyrring*, 1 Cr. M. & R. 193. See *Coxhead v. Richards*, 2 C. B. 569.

(*u*) *Ante*, vol. i. p. 197.

(*x*) *Ryalls v. Leader*, L. R. 1 Ex. 296.

(*y*) *Kelly v. Tinting*, L. R. 1 Q. B. 699; *Kelly v. Sherlock*, *Id.* 686; See *Wason v. Walter*, 38 L. J., Q. B. 34.

not contain slanderous observations unconnected with the work professed to be criticised (x).

The mode of declaring in an action for defamation, whether libel or slander, has been simplified by the Common Law Procedure Act, 1852 (a), and by the stat. 6 & 7 Vict. c. 96, some material improvements with regard to it have been effected, the defendant in an action for slander or libel, giving notice in writing to the plaintiff at the time of pleading of his intention, may give in evidence, in mitigation of damages, that he made or offered an apology before the commencement of the action, or as soon afterwards as he had an opportunity, in case the action was commenced before (b). And in an action for a libel in a public newspaper, or other periodical publication, the defendant may plead that it was inserted without actual malice, and without gross negligence, and that before the commencement of the action, or at the earliest opportunity afterwards, he inserted a full apology for it; or, if the newspaper or other periodical in which it appeared should be ordinarily published at intervals exceeding one week, had offered to publish the apology in any newspaper, &c., to be selected by the plaintiff: and upon filing such plea, he may pay into court a sum of money by way of amends for the injury sustained by the publication of the libel (c).

3rdly. A third way of destroying or injuring a man's reputation is by preferring a malicious indictment or instituting a malicious prosecution against him; which, under the mask of justice and public spirit, is sometimes made the engine of private spite and enmity. For this the law has given a remedy, either by action for conspiracy (d), which cannot be brought but against two persons at the least; or, which is the more usual way, by an action on the case

(z) *Fraser v. Berkeley*, 7 C. & P. 621; *Carr v. Hood*, 1 Camp. 354 n.

(a) 15 & 16 Vict. c. 76, s. 61.

(b) S. 1.

(c) S. 2; see 15 & 16 Vict. c. 76, s. 70; *Jones v. Mackie*, L. R. 3 Ex. 1.

(d) *Finch*, L. 305.

for a false and malicious prosecution (*e*). The essential ground of which action is, that a legal prosecution was carried on without a probable cause; and this must be substantively and expressly proved, and cannot be implied. From the want of probable cause, malice, indeed, may be, and most commonly is, implied, and the knowledge of the defendant is also implied; but from the most express malice, the want of probable cause cannot be implied (*f*). At the trial of this action, it is the duty of the judge to inform the jury, if they find the facts proved, and the inferences to be warranted by such facts, that the same do or do not amount to reasonable or probable cause, so that the question of fact is for the jury, and the abstract question of law is for the judge (*g*).

In such an action, moreover, it is essential to show that the proceeding alleged to have been instituted maliciously and without probable cause, has terminated in favour of the plaintiff, if, from its nature, it were capable of such termination (*h*). But an action on the case for a malicious prosecution may be founded upon an indictment, whereon no acquittal can be had; as if it be rejected by the grand jury, or be *coram non judice*, or be insufficiently drawn. For it is not the danger of the plaintiff, but the scandal, vexation, and expense caused, upon which this action is founded.

II. Injuries
affecting
personal
liberty.

II. We are next to consider the violation of the right of personal liberty. This may be constituted, 1, by the injury of false imprisonment, or 2, by that of malicious arrest.

1. False imprisonment.

1. To constitute the injury of false imprisonment there are two points requisite; (1.) The detention of the person:

(*e*) F. N. B. 116.

Williams, 11 M. & W. 205.

(*f*) *Sutton v. Johnstone*, 1 T. R. 544; *per Parke, J.*, *Mitchell v. Jenkins*, 5 B. & Ad. 594; *Panton v. Williams*, 2 Q. B. 192; *Mitchell v.*

(*g*) *Ib.*

(*h*) *Basché v. Matthews*, L. R. 2 C. P. 684, and cases there cited.

and (2.) The unlawfulness of such detention. Every confinement of the person is an imprisonment, whether it be in a common prison, or in a private house, or even by forcibly detaining one in the public streets(*i*). Unlawful, or false, imprisonment consists in such confinement or detention without sufficient authority: which authority may arise either from some process from the courts of justice, or from some warrant from a legal officer having power to commit, under his hand and seal, and expressing the cause of such commitment(*k*); or from some other special cause justified, for the necessity of the thing, either by common law, or act of parliament; such as the arresting of a felon by a private person without warrant, or the impressing of a mariner for the public service(*l*). False imprisonment also may arise by executing a lawful warrant or process at an unlawful time, as on a Sunday(*m*). Such is the injury. Let us next consider the remedy for it: which is of one or other of two sorts; the one removing the injury, the other compelling satisfaction for it.

The means of removing the actual injury of false imprisonment known in very early times to our common law were fourfold. (1). By writ of mainprize. (2). By writ *de odio et atid.* (3). By writ *de homine replegiando.* (4). By writ of *habeas corpus.* Of these writs, the three first mentioned are either abolished, or have become obsolete, and our remarks respecting them will therefore be very brief.

(1). The writ of mainprize(*n*), *manucaptio*, though now disused, is often mentioned in the old reports, and may be directed to the sheriff (either generally, when any man is imprisoned for a bailable offence, and bail has been refused; or specially, when the offence or cause of commitment is not properly bailable below), commanding him to take sureties for the prisoner's appearance, usually

(1). Writ of mainprize.

(i) 2 Inst. 589.

(m) Stat. 29 Car. 2, c. 7, s. 6.

(k) 2 Inst. 52, 591.

(n) As to which see *Crowley's*

(l) Broom's Const. L. pp.116—118. Case, 2 Swanst. 1.

called "mainperners," and to set him at large (*o*). Mainperners differ from bail, in that a man's bail may imprison or surrender him up before the stipulated day of appearance; mainperners can do neither, but are barely sureties for his appearance at the day; bail are only sureties, that the party be answerable for the special matter for which they stipulate; mainperners are bound to produce him to answer all charges whatsoever (*p*).

(2). Writ *de odio et atia*.

(2). The writ *de odio et atia* was anciently directed to the sheriff, commanding him to inquire whether a prisoner charged with murder was committed upon just cause of suspicion, or merely *propter odium et atiam*, for hatred and ill-will; and if upon the inquisition due cause of suspicion did not appear, then there issued another writ for the sheriff to admit him to bail. This writ, according to Bracton (*q*), was not to be denied to any man (*r*).

(3). Writ *de homine replegiando*.

(3). The writ *de homine replegiando* (*s*) lay to replevy a man out of prison, or out of the custody of any private person, upon giving security to the sheriff that the man should be forthcoming to answer any charge against him. And if the person were conveyed out of the sheriff's jurisdiction, the sheriff might have returned that he was eloigned, *elongatus*: upon which a process issued (called a *capias in withernam*) to imprison the defendant himself, without bail or mainprize, till he should produce the party. This writ, however, was guarded by so many exceptions (*t*),

(*o*) F. N. B. 250; 1 Hale, P. C. 141; Coke on Bail and Mainp. ch. 10.

(*p*) Coke on Bail and Mainp. ch. 3; 4 Inst. 179.

(*q*) L. 3, tr. 2, c. 8.

(*r*) See *Magna Carta*, c. 26, and stat. West. 2, 13 Edw. 1, c. 29. The statute of Gloucester, 6 Edw. 1, c. 9, restrained the use of this writ in the case of killing by misadventure or in self-defence, and the 28 Edw. 3, c. 9, abolished it altogether:

but as 42 Edw. 3, c. 1, repealed all statutes then in being, contrary to the great charter, sir Edward Coke thought that the writ *de odio et atia* was thereby revived (2 Inst. 43, 55, 315). This latter statute was however itself repealed by the 26 & 27 Viet. c. 125.

(*s*) F. N. B. 66.

(*t*) *Nisi captus est per specule præceptum nostrum, vel capitalis justitiarum nostri, vel pro morte hominis, vel pro foresta nostra, vel pro*

that it was not an effectual remedy in many cases, especially where the crown was concerned. The incapacity therefore of these three remedies to give complete relief in every case gradually antiquated them; and caused a general recourse to be had, in behalf of persons aggrieved by illegal imprisonment, to

(4). The writ of *habeas corpus*, the most celebrated writ in the English law. Of this there are various kinds made use of by the courts at Westminster, for removing prisoners from one court into another for the more easy administration of justice. Such is the *habeas corpus ad respondendum*, now unnecessary, but which was formerly used when a man had a cause of action against one who was confined by the process of some inferior court, in order to remove the prisoner, and charge him with the new action in the court above. Such is that *ad satisfaciendum*, when a prisoner has had judgment against him in an action, and the plaintiff is desirous to bring him up to some superior court to charge him in execution (u). Such also are those *ad prosequendum*, *testificandum*, *deliberandum*, &c. (x); which issue when it is necessary to remove a prisoner, in order to prosecute, or bear testimony in any court, or to be tried in the proper jurisdiction. Such also is the writ *ad faciendum et recipiendum*, which issued out of one of the courts at West-

(4). Writ of
*habeas
corpus.*

aliquo alio recto, quare secundum consuetudinem Angliæ non sit replegiabilis. (Registr. 77.)

(u) This writ, however, need not be sued out against one who is already in the prison of the court, 15 & 16 Vict. c. 76, s. 127.

(x) By stats. 43 Geo. 3, c. 140, and 44 Geo. 3, c. 102, the *habeas corpus ad satisfaciendum* has been rendered more efficient. By the first, a judge may award the writ for the purpose of bringing any prisoner from any gaol in England

or Ireland as a witness, before any court martial, commissioners of bankrupt, or for auditing public accounts, or other commissioners, under any commission or warrant from the crown (the statute has the same application to the *habeas corpus ad deliberandum*). By the other statute, a similar power is given for bringing up any prisoner as a witness before any of the courts, or any justice of oyer and terminer, or gaol delivery, or sitting at *nisi prius*, in England or Ireland.

minster, when a person, sued in some inferior jurisdiction, was desirous to remove the action into the superior court; it commanded the inferior judge to produce the body of the defendant, together with the day and cause of his caption and detainer (whence the writ was frequently denominated a *habeas corpus cum causâ*) to do and receive whatsoever the court should consider in that behalf. The writ in question was available to bring up a defendant who was actually or constructively in the custody of an inferior court; and inasmuch as by the stat. 1 & 2 Vict. c. 110, a defendant can no longer be held to bail in such a court, the writ of *habeas corpus cum causâ* can in general be no longer used (*y*).

But the great and efficacious writ, in all manner of illegal confinement, is that of *habeas corpus ad subjiciendum*; directed to the person detaining another, and commanding him to produce the body of the prisoner, with the day and cause of his caption and detention, *ad faciendum, subjiciendum, et recipiendum*, to do, submit to, and receive whatsoever the judge or court awarding such writ shall consider in that behalf. This is a high prerogative writ, and therefore at common law issuing out of the court of queen's bench not only in term time, but also during the vacation (*z*), and running into most parts of the queen's dominions: for the queen is at all times entitled to have an account, why the liberty of any of her subjects is restrained, wheresoever that restraint may be inflicted. Formerly, indeed, if the party were privileged in the court of common pleas or exchequer, as being (or supposed to be) an officer or suitor of the court, a *habeas corpus ad subjiciendum* might also by common law have been awarded from thence (*a*); and, if the cause of imprisonment were palpably illegal, such court might have discharged him (*b*): but, if he were committed for any

(*y*) 2 Chitt. Pr. 11th ed. 1309.

(*a*) 2 Inst. 55; 4 *Id.* 290; 2 Hale

(*z*) See *Leonard Watson's Case*, 9

P. C. 144.

Ad. & E. 731.

(*b*) *Bushell's Case*, 6 St. Tr. 1021.

criminal matter, they could only have remanded him, or taken bail for his appearance in the queen's bench (c), which occasioned the common pleas for some time to discountenance such applications. But since the mention of the queen's bench and common pleas, as co-ordinate in this jurisdiction, by statute 16 Car. 1, c. 10, every subject of the kingdom has been held to be equally entitled to the benefit of the common law writ, in either of those courts, at his option; and it may now issue out of the court of exchequer, under the 56 Geo. 3, c. 100, s. 2 (d).

It is necessary to apply for a *habeas corpus* by motion to the court, as in the case of other prerogative writs which do not issue as of mere course, without showing some probable cause why the extraordinary power of the crown is called in to the party's assistance. For, as was argued by lord chief justice Vaughan (e), "it is granted on motion, because it cannot be had of course; and there is therefore no necessity to grant it; for the court ought to be satisfied that the party hath a probable cause to be delivered." And this seems the more reasonable because (when once granted) the person to whom it is directed must, at the risk of an attachment being issued against him, bring up the body of the prisoner, or show that he is unable to do so. So that if the writ issued of mere course, without showing to the court or judge some reasonable ground for awarding it, a traitor or felon under sentence of death, a soldier or seaman in the queen's service, or one committed for contempt or confined for insanity, might obtain a temporary enlargement by suing out a *habeas corpus*, though sure to be remanded when brought up to the court. And therefore sir Edward Coke, when chief justice, did not scruple in 13 Jac. 1, to deny a *habeas corpus* to one confined by the court of admiralty

(c) Carter, 221; 2 Jones, 13.

(d) See also 1 & 2 Vict. c. 45, which equalises the jurisdiction at judge's chambers, and is applicable,

inter alia, to the granting of the writ of *habeas corpus*. Corner Cr. Off. Pr. 112.

(e) *Bushell's Case*, 2 Jones, 13.

for piracy; there appearing, upon his own showing, sufficient grounds to confine him (*f*). On the other hand, if a probable ground be shown, that the party is imprisoned without just cause (*g*), and therefore has a right to be delivered, the writ of *habeas corpus* is then a writ of right, which “may not be denied, but ought to be granted to every man that is committed, or detained in prison, or otherwise restrained, though it be by the command of the king, the privy council, or any other (*h*).”

In a former part of these Commentaries (*i*) we expatiated at large on the personal liberty of the subject. This was shown to be a natural inherent right, which could not be surrendered or forfeited, unless by the commission of some offence against society, and which ought not to be abridged in any case without the special permission of law. A doctrine coeval with the first rudiments of the English constitution, and handed down to us from our Saxon ancestors, notwithstanding all their struggles with the Danes, and the violence of the Norman conquest: asserted afterwards and confirmed by the conqueror himself and his descendants; and though sometimes impaired by the ferocity of the times, and the occasional despotism of jealous or usurping princes, yet established on the firmest basis by the provisions of *Magna Carta*, and a succession of statutes affirming them. To assert an absolute exemption from imprisonment in all cases, would be inconsistent with every idea of law and political society; and in the end would destroy all civil liberty, by rendering its protection impossible: but the glory of the English law consists in clearly defining the times, the causes, and the extent, when, wherefore, and to what degree the imprisonment of the subject may be lawful. This it is, which induces the absolute necessity of expressing upon every commitment the reason for which it is made: so that the court upon a *habeas corpus* may examine

(*f*) 3 Bulstr. 27.

(*g*) 2 Inst. 615.

(*h*) Com. Journ. 1 Apr. 1628.

(*i*) Vol. I. ch. 1.

into its validity; and, according to the circumstances of the case, may discharge, admit to bail, or remand the prisoner.

And yet, early in the reign of Charles I. the court of king's bench, professing to rely on some arbitrary precedents, declared that they could not upon a *habeas corpus* either bail or deliver a prisoner, though committed without any cause assigned, in case he was committed by the special command of the king, or by the lords of the privy council (*k*). But the petition of right, 3 Car. 1, c. 1, which recites this illegal judgment, enacts that no freeman shall thenceforth be so imprisoned or detained. When, in the following year, Mr. Selden and others were committed by the lords of the council, in pursuance of the king's special command under a general charge of "notable contempts and stirring up sedition against the king and government," the judges delayed for two terms (including also the long vacation) to deliver an opinion how far such a charge was bailable. And when at length they agreed that it was, they however annexed a condition of finding sureties for the good behaviour, which still protracted the imprisonment; the chief justice, sir Nicholas Hyde, at the same time declaring (*l*), that if the prisoner were again remanded for that cause, perhaps the court would not afterwards grant a *habeas corpus*, being already made acquainted with the cause of the imprisonment. But this was heard with indignation and astonishment by every lawyer present; according to Mr. Selden's own account of the matter, whose resentment was not cooled at the distance of four-and-twenty years (*m*).

(*k*) *Darnel's Case*, 3 St. Tr. 1; Broom's Const. L. 162.

(*l*) St. Tr. iii. 289.

(*m*) *Etiam judicum tunc primarius, nisi illud faceremus, rescripti illius forensis, qui libertatis personæ is omnimodæ vindex legitimus est*

fere solus, usum omnimodum palam pronuntiavit (sui semper similis) nobis perpetuo in posterum denegandum. Quod, ut odiosissimum juris prodigium, scientioribus hic universis censitum. (Vindic. Mar. Claus. edit. A.D. 1653.)

These pitiful evasions gave rise to the statute 16 Car. 1, c. 10, enacting (s. 8), that if any person be committed by the sovereign in person, or by his privy council, or by any of the members thereof, he shall have granted unto him, without delay upon any pretence whatsoever, a writ of *habeas corpus*, upon which the legality of such commitment shall be examined, and justice shall be done by delivering, bailing, or remanding such prisoner. Yet still in the case of Jenkes, who in 1676 was committed by the king in council, for a turbulent speech made by him on the hustings at Guildhall (*o*), new shifts and devices were made use of to prevent his enlargement by law, the chief justice (as well as the chancellor) declining to award a writ of *habeas corpus ad subjiciendum* in vacation, though at last he thought proper to allow process to issue, whereby the prisoner was discharged. Other abuses had also crept into daily practice, which in some measure defeated the benefit of this great constitutional remedy. The party imprisoning was at liberty to delay his obedience to the first writ, and might wait till a second and a third, called an *alias* and a *pluries*, were issued, before he produced the party; and other vexatious shifts were practised to detain state prisoners in custody. To repress these was passed the Habeas Corpus Act, 31 Car. 2, c. 2, intituled "An Act for the better securing the liberty of the subject, and for prevention of imprisonments beyond the seas."

This statute enacts, 1. That on complaint and request in writing by or on behalf of any person committed and charged with any crime (unless committed for treason or felony expressed in the warrant; or as accessory, or on suspicion of being accessory, before the fact, to any felony, or upon suspicion of such felony, plainly expressed in the warrant; or unless he is convicted or charged in execution by legal process), the lord chancellor, or any of the twelve

(*o*) St. Tr. vi. 1189.

judges, in vacation, upon viewing a copy of the warrant, or affidavit that a copy is denied, shall (unless the party has neglected for two terms to apply to any court for his enlargement) award a *habeas corpus* for such prisoner, returnable immediately before himself or any other of the judges; and upon the return made shall discharge the party, if bailable, upon giving security to appear and answer to the accusation in the proper court of judicature.

2. That such writ shall be indorsed, as granted in pursuance of this act, and signed by the person awarding it.

3. That the writ shall be returned and the prisoner brought up, within a limited time according to the distance, not exceeding in any case twenty days. 4. That officers and keepers neglecting to make due returns, or not delivering to the prisoner or his agent within six hours after demand a copy of the warrant of commitment, or shifting the custody of a prisoner from one to another, without sufficient reason or authority (specified in the act), shall for the first offence forfeit 100*l.*, and for the second offence 200*l.* to the party grieved, and be disabled to hold his office.

5. That no person once delivered by *habeas corpus* shall be recommitted for the same offence, on penalty of 500*l.*

6. That every person committed for treason or felony shall, if he requires it the first week of the next term, or the first day of the next session of *oyer and terminer*, be indicted in that term or session, or else admitted to bail: unless the witnesses for the crown cannot be produced at that time: and if acquitted, or if not indicted and tried in the second term, or session, he shall be discharged from his imprisonment for such imputed offence: but that no person, after the assizes shall have opened for the county in which he is detained, shall be removed by *habeas corpus*, till after they are ended; but shall be left to the justice of the judges of assize.

7. That any such prisoner may move for and obtain his *habeas corpus*, as well out of the chancery or exchequer, as out of the king's bench or common pleas; and the lord chancellor or judges

denying the same, on sight of the warrant or oath that the same is refused, forfeit severally to the party grieved the sum of 500*l.* 8. That this writ of *habeas corpus* shall run into the counties palatine, cinque ports, and other privileged places, and the islands of Jersey and Guernsey (*p*). 9. That no inhabitant of England (except a person contracting, or a convict praying, to be transported; or having committed some capital offence in the place to which he is sent) shall be sent prisoner to Scotland, or any place beyond the seas, within or without the dominions of the crown; on pain that the party committing, his advisers, aiders, and assistants, shall forfeit to the party aggrieved a sum of 500*l.* to be recovered with treble costs; shall be disabled to bear any office of trust or profit; shall incur the penalties of *præmunire*; and shall be incapable of receiving pardon from the crown.

Such is the substance of this great and important statute: which extends (we may observe) only to the case of a commitment for a criminal charge such that no inconvenience can be caused to public justice by a temporary enlargement of the prisoner: other cases of unjust imprisonment having formerly been left to the *habeas corpus* at common law. Now, however, a person confined "otherwise than for some criminal or supposed criminal matter," except he be imprisoned for debt, or by process in any civil suit, may avail himself of the statute 56 Geo. 3, c. 100, intituled, "An Act for more effectually securing the liberty of the subject," and providing as under (*q*):—

That a judge of any of the superior law courts, if it shall appear by affidavit or affirmation (when allowed), that there is probable and reasonable cause for doing so, shall award a writ of *habeas corpus* in vacation, returnable

(*p*) The writ runs also to the Isle of Man. *Re Brown*, 33 L. J., Q. B. 193. It does not, however, run into "any colony or foreign dominion of the crown where her Majesty has a lawfully established court or courts

of justice, having authority to grant and issue the said writ, and to ensure the due execution thereof throughout such colony or dominion." 25 & 26 Vict. c. 20, s. 1.

(*q*) Ss. 1—4, 6.

immediately. That wilful disobedience of the writ shall be deemed a contempt of court, and the judge before whom it is returnable may bind the offender to appear in court in the ensuing term to answer the contempt, or, on his refusal to give security, may commit him to prison. That a writ awarded late in the vacation may be made returnable in court, and one awarded by the court in term may be made returnable before a judge in vacation. That the truth of the return may be examined into by affidavit. That the provisions for making the writ returnable in term or vacation, and making disobedience to it a contempt of court, shall extend to writs awarded under the statute 31 Car. 2, c. 2.

By the admirable regulations above set forth, the remedy for removing the injury of unjust and illegal imprisonment may now be regarded as complete, and besides the efficacy of the writ of *habeas corpus* in liberating the subject from illegal confinement in a public prison, it also extends its influence to remove every unjust restraint of personal freedom in private life, though imposed by a husband on his wife, or by a father on his child; but when a feme covert or an infant is brought before the court by *habeas corpus*, the court will only set such person free from an unmerited or unreasonable confinement, and will not determine the validity of a marriage, or the right to the guardianship of an infant. Though if a child is too young to have any discretion of its own, the court will deliver it into the custody of its parent or of the person who appears to be its legal guardian (*r*).

The remedy by which to compel satisfaction for false imprisonment, is an action of trespass, which is generally, and almost unavoidably, accompanied with a charge of assault and battery: and therein the party may recover damages for the injury which he has sustained.

Remedy by
action for
false im-
prisonment.

Throughout these Commentaries, states of facts will,

(*r*) See *per* Lord Mansfield, 3 Burr. 1434.

from time to time, be found indicated, rendering justifiable the restraint of a man's person otherwise than in virtue of process, criminal or civil, or in pursuance of statutory provisions. Thus a private person may lawfully interpose to put a stop to a breach of the peace, and may arrest any of the queen's subjects who are engaged in it (*t*). So where a felony has been committed, a person suspected on reasonable and probable cause of having committed it may lawfully be arrested and imprisoned, in order that a criminal charge may be preferred against him; and if such charge prove groundless, and an action be afterwards brought at suit of the party charged against the person who caused him to be apprehended, the issue may substantially be of this kind—had the defendant reasonable and probable cause for giving the plaintiff into custody as the offender? Should it appear that he did so without availing himself of a ready and obvious mode of ascertaining the truth, the absence of inquiry by the defendant will be an element in determining as to the existence of reasonable and probable cause for the arrest (*u*).

2. Malicious arrest.

2. The action for a malicious arrest is a remedy available where legal process has maliciously, and without reasonable or probable cause, been put in force (*x*). To support this action, it must be shown that the former suit or proceeding was determined in the plaintiff's favour (*y*).

Injuries affecting private property.

III. With regard to the third absolute right of individuals, *viz.*, that of holding private property; though the enjoyment of it when acquired is strictly a personal right, yet as its nature and origin, and the means of its acquisition or loss, fell more directly under our second general division, of the rights of things; and as, of course, the wrongs that affect these rights must be referred to the

(*t*) *Price v. Seeley*, 10 Cl. & F. 28. B. 929, 937; *Haffer v. Allen*, L. R.

(*u*) *Perryman v. Lister*, L. R. 3 2 Ex. 15.

Ex. 197.

(*y*) *Watkins v. Lee*, 5 M. & W.

(*r*) *Churchill v. Siggers*, 3 E. & 270.

corresponding division in the present volume of our Commentaries; it will be more commodious and easy to consider together, rather than in a separate view, the injuries that may be offered to the enjoyment, as well as to the rights, of property. And therefore I shall here conclude the head of injuries affecting the absolute rights of individuals.

We are next to contemplate wrongs which affect relative rights; or such as are incident to persons considered as members of society, and connected with each other by various ties and relations; and, in particular, such injuries as may be done to persons under the four following relations:—I. Husband and wife; II. Parent and child; III. Guardian and ward; IV. Master and servant (z).

I. Injuries which may be offered to a person, considered as a husband, and which are cognizable in a court of common law, are principally three: 1, abduction, or taking away a man's wife; 2, beating her; and 3, indirectly causing her some personal hurt, by negligence or otherwise. 1. As to the first sort, abduction, or taking her away, this may either be by fraud and persuasion, or open violence: though the law in both cases supposes force and constraint, the wife having no power to consent; and therefore gives a remedy by action of trespass (a); and the husband is also entitled to recover damages in an action on the case against such as persuade and entice the wife to live separate from him without a sufficient cause. The old law was so strict in this point, that if one's wife missed her way upon the road, it was not lawful for another man to take her into his house, unless she was benighted and in danger of being lost or drowned (b): but a stranger might carry her behind him on horseback to market, to a justice of the peace for a warrant against her husband, or

Injuries to
relative
rights.

I. Husband
and wife.

1. Abduc-
tion.

(z) As to these relations, see Vol. i. chaps. 14—17.

(a) *Norris v. Seed*, 3 Exch. 752.

(b) Bro. Abr. tit. *Trespas*, 213.

2. 3. Battery.
Hurt caused
by negli-
gence.

to the spiritual court to sue for a divorce (*c*). 2, 3. The second and third injuries, above mentioned, are constituted by beating a man's wife, or otherwise ill-using her; or causing hurt to her by negligence (*d*). For a common assault upon, or battery, or imprisonment, of the wife, the law gives the usual remedy to recover damages, by action of trespass, which must be brought in the names of the husband and wife jointly: but if the beating or other maltreatment be so enormous, that thereby the husband is deprived for any time of the company and assistance of his wife, the law then gives him a separate remedy by action for this ill-usage, *per quod consortium amisit*; in which he may recover a satisfaction in damages (*e*). By a provision of the C. L. Proc. Act, 1852 (*f*), in an action by husband and wife jointly for an injury to the wife, the husband is now allowed to add a claim in his own right—as for the loss of the wife's society—or where a joint trespass and assault have been committed on the husband and his wife.

II. Parent
and child.

II. The relation of parent and child is regarded by our law as in some respects analogous to that of master and servant, and hence an action is maintainable at suit of the parent for the seduction of his daughter (*g*); or for enticing away his daughter without debauching her (*h*); or, generally, for battery of a child (*i*): provided that in each of these cases some loss of service, actual or constructive, can be shown (*k*); and in any such action damages are recoverable proportionate to the injury inflicted. Further, under the stat. 9 & 10 Vict. c. 93, intituled "An Act for

(*c*) Ib. 207, 440.

(*d*) See *Longmead v. Holliday*, 6 Exch. 761.

(*e*) *Hyde v. Scissor*, Cro. Jac. 538.

(*f*) S. 40.

(*g*) *Terry v. Hutchinson*, L. R. 3 Q. B. 599; *Chamberlain v. Hazlewood*, 5 M. & W. 515; *Irwin v.*

Dearman, 11 East, 23.

(*h*) *Evans v. Walton*, L. R. 2 C. P. 615.

(*i*) *Marys's Case*, 9 Rep. 113; *Hall v. Hollander*, 4 B. & C. 663; *Eager v. Grimwood*, 1 Exch. 61.

(*k*) *Grinnell v. Wells*, 7 M. & Gr. 1033, and cases *supra*.

compensating the families of persons killed by accidents," an injury to the relation of parent and child has been made actionable, which, by our common law, was not remediable; for thereby it is enacted, "that whensoever the death of a person shall be caused by wrongful act, neglect, or default, and the act, neglect, or default is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof, then and in every such case the person who would have been liable if death had not ensued, shall be liable to an action for damages notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony" (*l*). And further, that "every such action shall be for the benefit of the wife, husband, parent (*m*), and child (*n*) of the person whose death shall have been so caused, and shall be brought by and in the name of the executor or administrator of the person deceased; and in every such action the jury may give such damages as they may think proportioned to the injury resulting from such death to the parties respectively for whom and for whose benefit such action shall be brought; and the amount so recovered, after deducting the costs not recovered from the defendant, shall be divided amongst the before-mentioned parties in such shares as the jury by their verdict shall find and direct" (*o*).

An action under the above statute must be commenced within twelve calendar months after the death occurred (*p*), and damages may be recovered in it commensurate with the pecuniary loss caused by the defendant (*q*).

(*l*) S. 1.

(*m*) By sect. 5, the word "parent" shall include father and mother, and grandfather and grandmother, and stepfather and stepmother.

(*n*) By sect. 5, the word "child" shall include son and daughter, and grandson and granddaughter, and

stepson and stepdaughter.

An illegitimate child is not within the above section: *Dickinson v. North Eastern R. C.*, 2 H. & C. 735.

(*o*) S. 2.

(*p*) S. 3.

(*q*) *Dalton v. South Eastern R. C.*,

III. Guardian and ward.

III. Injuries to the relation of guardian and ward are usually redressed in equity (*r*), though in strictness an action (formerly not uncommon) would still be maintainable at suit of a guardian for taking away his ward (*s*); it will lie also for her seduction if he be *in loco parentis* (*t*).

IV. Master and servant.

IV. To the relation between master and servant, and the rights accruing therefrom, there are two species of injuries incident. The one is, retaining a man's hired servant before his time is expired; the other is beating him, causing him personal hurt, or confining him so that he is not able to perform his work. As to the first, the retaining another person's servant during the time he has agreed to serve his present master; this, as it is an ungentlemanlike, so it is also an illegal act. For every master has by his contract purchased for a valuable consideration the service of his domestics for a limited time: the inveigling or hiring his servant, which induces a breach of this contract, whether done maliciously or with notice after existence of the relation, is therefore an injury to the master; and for that injury the law has given him a remedy by action (*u*); and the master may also have an action against the servant for the non-performance of his agreement. The other injury is that of beating, confining, or disabling a man's servant, which depends upon the same principle as the last; *viz.*, the property which the master has by his contract acquired in the labour of the servant. In this case, besides the remedy by action for battery, bodily hurt, or imprisonment, which the servant himself, as an individual, may have against the aggressor, the master also, to compel a recompence for his immediate

4 C. B., N. S. 296.

Satisfaction made to the deceased will, however, afford an answer to the action. *Read v. Great Eastern*

R. C., L. R. 3 Q. B. 555.

(*r*) *Ante*, p. 77.

(*s*) See *Evans v. Walton*, L. R. 2

C. P. 615, citing *Barham v. Dennis*, Cro. Eliz. 770; 2 P. Wms. 108; *Gilbert v. Schwennck*, 14 M. & W. 488.

(*t*) See *Irwin v. Dearman*, 11 East, 23.

(*u*) *Lumley v. Gye*, 2 E. & B. 216.

loss, may maintain an action, in which he must allege and prove the special damage he has sustained by the beating of his servant, *per quod servitium amisit* (x); and in which the jury will make him a proportionable pecuniary satisfaction. If, however, bodily hurt were caused to the servant by the defendant, whilst performing his contract with the servant, *ex gr.*, as a carrier of passengers for hire, and there be no privity between the defendant and the master, an action at suit of the latter will not lie (y).

We may observe that in these relative injuries, notice is only taken of the wrong done to the superior of the parties related, by the breach and dissolution of either the relation itself, or at least the advantage accruing therefrom: while the loss of the inferior by such injuries is, except where the death of a parent has been caused by negligence (x), unregarded. One reason for which may be, that the inferior has no kind of property in the company, care, or assistance of the superior, as the superior is held to have in that of the inferior; and therefore the inferior can, in contemplation of law, suffer no loss consequential on a wrongful act done to his superior. The wife cannot recover damages for the beating of her husband. The child has no property in his father or guardian. And the servant, whose master is disabled, does not thereby lose his maintenance or wages. He had no property in his master; and if he receives his part of the stipulated contract he suffers no injury, and is therefore entitled to no action, for any battery or imprisonment which such master may happen to endure.

(x) *Marys's Case*, 9 Rep. 113.

C. B., N. S. 213.

(y) *Alton v. Midland R. C.*, 19

(z) *Ante*, p. 150.

CHAPTER IX.

JURISDICTION OF SUPERIOR COURTS OF LAW. BREACHES OF CONTRACT.

IN the preceding chapter we considered wrongs which affect the rights of persons, viewed either as individuals, or as related to each other; and are now to enter upon the discussion of such wrongs and breaches of contract as directly or indirectly affect the rights of property, together with the remedies which the law has given to repair or redress them.

We shall first enquire respecting breaches of contract unauthenticated by deed; of bonds and covenants we have treated in our preceding volume.

Simple contract, how defined.

A simple contract may be defined to be "an agreement or undertaking upon consideration, to do or not to do a particular thing." From which definition there arise three points to be contemplated in every contract; 1st. The agreement or undertaking; 2ndly. The consideration; and 3rdly. The thing to be done or not to be done.

1st. The agreement;

First, then, a contract is an agreement, a mutual bargain or convention; and to constitute it there must be at least two parties consenting and competent to contract: as where A. contracts with B. on some sufficient consideration, as to which we shall presently enquire, to pay him 100*l.*, and thereby transfers a property in such sum to B. Which property is however not in possession, but in action merely, and recoverable by suit at law.

Parties are perfectly free to contract in any way that the law does not forbid; this right to contract being essential for the trading classes, and indeed for every

member of the community. A contract may be either express or implied.

An express contract is where the terms of the agreement Express; are, at the time of making it, openly uttered and avowed, as to deliver an ox, or ten loads of timber, or to pay a stated price for certain goods.

An implied contract is one which reason and justice dic- Implied. tate, and which therefore the law presumes that every man undertakes to perform. Thus, if I employ a person to transact any business for me, or perform any work, the law implies that I undertook or assumed to pay him so much as his labour deserved. And if I neglect to make him amends, he has a remedy for this injury by bringing his action on the case upon such implied promise, undertaking, or *assumpsit*; wherein he is at liberty to suggest that I promised to pay him so much as he reasonably deserved, and then to aver that his trouble was really worth such a particular sum, which the defendant has omitted to pay. But this valuation of his trouble is submitted to the determination of a jury; who will assess such a sum in damages as they think he really merited. This is in technical language, called an *assumpsit* on a *quantum meruit*. So, if I take up wares from a tradesman, without any agreement of price, the law concludes that I contracted to pay their real value, and there is an implied *assumpsit* on a *quantum valebat*, which is very similar to the former. The law concludes, that both parties did intentionally agree, that the real value of the goods should be paid; and an action may be brought accordingly, if the vendee refuses to pay such value.

Another species of implied *assumpsit* is when one has received money belonging to another, without any valuable consideration given on the receiver's part: for the law construes this to be money received for the use of the owner only; and implies that the person so receiving promised and undertook to account for it to the true proprietor. And if he unjustly detains it, an action lies

against him for the breach of such implied promise and undertaking; and he will be made to recompense the owner in damages, for what he has detained in violation of his promise. This is a very extensive and beneficial remedy, applicable in many cases where the defendant has received money which *ex æquo et bono* he ought to refund. It lies for money paid by mistake or on a consideration which has failed, or through imposition, extortion or oppression, or where any undue advantage has been taken of the plaintiff's situation.

So where a person has laid out and expended his own money for the use of another, at his request, the law implies a promise of repayment, and an action will lie on this *assumpsit*; and upon a stated account between two merchants, or other persons, the law implies that he against whom the balance appears has engaged to pay it to the other; though there be not any actual promise.

A contract then may be set forth in words spoken or written, or may be raised and inferred from what has been said, or from surrounding circumstances and the conduct of the parties. Of either sort of contract, express or implied, a court of law will take cognisance, and will award pecuniary compensation for its breach. A court, however, must often be guided by considerations in regard to the one of them, different from those which guide or influence it in regard to the other. An express contract, when conceived in terms definite and unambiguous, indicates the reciprocal rights and duties of the parties to it. And here the function of the court is auxiliary to carrying into effect, so far as its machinery may allow, their will. It sometimes happens, however, that the wording of an express contract is obscure and doubtful, and then the duty of interpreting it devolves upon the court, and certain rules of construction have to be called in aid for determining its significance. The leading canons of interpretation may be thus expounded. The construction must be ascertained on a view and careful examination

of the entire instrument, one part of which should be made, if possible, to explain another, so that every word used in it may take effect. The duty of the court being to ascertain not what the contracting parties may be supposed to have intended, but the meaning of the words which they have used; and these words should be construed according to their ordinary and grammatical sense, unless some obvious absurdity, or some repugnance, or inconsistency with the intention appearing on the whole instrument, would follow from such construction—the words used will then, if possible, be modified to avoid the consequences hinted at, but no further (a). Evidence of usage and custom is, moreover, admissible, to explain a mercantile contract, provided such evidence does not go to contravene or vary it.

A contract may either be executed, as if A agrees to change horses with B, and they do it immediately; in which case the possession and the right are transferred together: or it may be executory, as if they agree to change next week; here the right only vests, and their reciprocal property in each other's horse is not in possession but in action; for a contract executed conveys a chose in possession; a contract executory conveys only a chose in action.

2ndly. Having thus shown the general nature of a contract, we are, secondly, to proceed to the consideration upon which it is founded; or the reason which moves the contracting party to enter into the contract. A contract is an agreement, "upon consideration." The benefit which accrues to the promisor, or the inconvenience or detriment suffered by the promisee, is called the consideration for the promise: and it must be a thing lawful in itself, or else the contract is voidable. A good consideration merely,

(a) See the remarks of Lord Wensleydale, *Slingsby v. Grainger*, 7 H. L. Ca. 284; *Abbott v. Middleton*, *Id.* 114; *Grey v. Pearson*, 6

H. L. Ca. 106, which, though made with reference to testamentary instruments, are applicable to agreements.

which, as we have before seen (*b*), is that of blood or natural affection between near relations, will not support an *assumpsit*. But a contract may rest upon any valuable consideration, as money, or work done, for the person contracted with has then given an equivalent in recompense, for the undertaking by the other party.

Valuable considerations are divided by the civilians (*c*) into four species: 1. *Do, ut des*: as when I give money or goods, on a contract that I shall be repaid money or goods for them again. Of this kind are all loans of money upon bond, or promise of re-payment; and all sales of goods, in which either there is an express contract to pay so much for them, or else the law implies a contract to pay so much as they are worth. 2. The second species is, *facio, ut facias*: as, when I agree with a man to do his work for him, if he will do mine for me; or if two persons agree to marry together; or to do any other positive acts on both sides: Or, it may be to forbear on one side in consideration of something done on the other; as, that in consideration A, the tenant, will repair his house, B, the landlord, will not sue him for waste. Or, it may be for mutual forbearance on both sides; as, that in consideration that A will not trade to Lisbon, B will not trade to Marseilles; so as to avoid interfering with each other. 3. The third species of consideration is *facio, ut des*: when a man agrees to perform any thing for a price, either specifically mentioned, or left to the determination of the law to set a value to it. And when a servant hires himself to his master for certain wages or an agreed sum of money: here the servant contracts to do his master's service, in order to earn that specific sum. Otherwise, if he be hired generally; for then he is under an implied contract to perform the service for what it shall be reasonably worth. 4. The fourth species is, *do, ut facias*: which is the direct counterpart of the preceding. As when I agree with a servant to give him such wages, upon his

(*b*) *Ante*, Vol. ii.

(*c*) Dig. 19. 5. 5.

performing such work : which, we see, is nothing else but the last species inverted ; for *servus facit, ut herus det*, and *herus dat, ut servus faciat*.

The nature of a consideration will be abundantly exemplified in the ensuing pages, and we shall here merely add that a consideration of some sort or other is so necessary to the forming of a contract, that a *nudum pactum*, or agreement to do or pay something on one side, without any compensation on the other, will not at law support an action : and a man cannot be compelled to perform it. As if one man promises to give another 100*l.*, here there is nothing contracted for or given on the one side, and therefore there is nothing binding on the other. And, however a man may or may not be bound to perform his promise, in honour or conscience, which the municipal laws do not take upon them to decide ; certainly those municipal laws will not compel the execution of that which he had no visible inducement to engage for : for our law has adopted the maxim of the civil law that *ex nudo pacto non oritur actio*.

3rdly. We are next to consider the thing agreed to be done or not to be done. A contract is an agreement, upon consideration, “to do or not to do a particular thing.”

3rdly. The thing to be done or not to be done.

We must here consequently enquire concerning specific kinds of contracts, and shall divide them into three classes. I. Contracts which are required to be in writing by the statute law. II. Contracts which, by mercantile custom, are in writing. III. Other contracts.

I. Within the first of the above three classes (regard being had to the scope of our present Volume (*d*)), may be included the contract of sale, guaranties, agreements not to be performed within a year, and some other contracts which are of less frequent occurrence and less importance (*e*).

I. Contracts required to be in writing by statute.

(*d*) Contracts relating to real property have been discussed in Vol. ii. on written contracts, see Tilsley's Stamp Acts.

(*e*) Generally, as regards the stamps

1. Contract
of sale.

1. Sale is a transfer of property from one man to another, in consideration of some price or recompense in value: for there is no sale without a recompense; there must be *quid pro quo* (*f*). A commutation of goods for goods, is properly an exchange; but a transferring of goods for money, is called a sale: which is a method of exchange introduced for the convenience of mankind, money having been established as a universal medium, which may be exchanged for all sorts of other property; whereas if goods were only to be exchanged for goods, by way of barter, it would be difficult to adjust the respective values, and the carriage would be intolerably cumbersome. All civilized nations adopted therefore very early the use of money; for we find Abraham giving "four hundred shekels of silver, current money with the merchant," for the field of Machpelah (*g*): though the practice of exchange is still found to subsist among savage tribes. We shall not further advert to it, as such a transaction rarely comes under judicial notice (*h*).

A sale differs from a gift, inasmuch as there is a consideration for the former, and none for the latter. And hence the gift of a chattel, if valid, must either be authenticated by deed, or be accompanied with delivery of possession (*i*); as if A gives to B 100*l.*, or a flock of sheep, and puts him in possession of them directly, it is then a gift executed in the donee; and it is not in the donor's power to retract it, though he did it without any consideration or recompense: unless it be prejudicial to creditors; or the donor were under some legal incapacity, as infancy or coverture; or if he were drawn in, circumvented, or imposed upon, by false pretences, ebriety, or surprise.

If A and B mutually treat for the sale and purchase of goods which are in *esse*, then, generally speaking, their contract will be complete when its terms have been

(*f*) Noy's Max. c. 42.

Bing. 280.

(*g*) Gen. c. 23, v. 16.(*i*) *Irons v. Smallpiece*, 2 B. & Ald.(*h*) See *Parker v. Rawlings*, 4 551; *Shower v. Pilck*, 4 Exch. 478.

adjusted and made sufficiently definite, and have been assented to on both sides. If the vendor says, the price of certain goods is four pounds, and the vendee says, he will give four pounds, the bargain is struck; and neither of the parties is at liberty to be off, the obligation imposed upon the vendor being to deliver the goods upon payment of the price, and that imposed on the purchaser being to pay the price agreed upon, and receive the goods (*j*); and in the case put, the property in the goods, if defined and appropriated (*k*), passes by the bargain and sale to the vendee. According to the law of England, "by a contract for the sale of specific ascertained goods, the property immediately vests in the buyer, and a right to the price in the seller, unless it can be shown that such was not the intention of the parties" (*l*).

Where, indeed, parties have, by their words or conduct, sufficiently indicated their intention as to the mode of carrying out the stipulations of their contract, a court of law, if called on, will endeavour to give operation and effect to such intention. If there be a sale of goods which are to be sent by a carrier to the purchaser, and the goods perish or sustain damage whilst *in transitu*, the ordinary rule of our law would, in the absence of special circumstances, apply. Delivery to the carrier is delivery to the consignee, who will therefore have to bear the loss. But if the parties intend that the vendor shall not merely deliver the goods to the carrier, but undertake that they shall actually be delivered at their destination, and express such intention, effect will be given to this arrangement; and in such a case, if the goods perish in the hands of the carrier, the vendor is not only not entitled to the price, but he is liable for whatever damage may have been sustained by the purchaser, in consequence of the breach of his (the vendor's)

(*j*) Blackburn, *Contract of Sale*, 388; *Young v. Matthews*, L. R. 2 C. P. 127.

(*k*) See *White v. Wilks*, 5 Taunt. (*l*) *Gilmour v. Supple*, 11 Moo. P. C. C. 566.

contract to deliver at the place of destination. Or, again, the parties may intend that the vendor shall deliver the goods, which are the subject-matter of their contract, to the carrier, and that, when he has done so, he shall have fulfilled his undertaking, so that he shall not be liable in damages for a breach of contract if the goods do not reach their destination; and yet the contracting parties may intend that the whole or part of the price shall not be payable unless the goods arrive. The parties may bargain and agree that the property in the goods shall vest in the purchaser as soon as the goods are shipped, and yet that the price in whole or in part shall be payable only on the contingency of the goods arriving; and to such an arrangement, if the intention of the parties be expressed, the court will give effect; if the intention be not expressed in terms, the court will endeavour to ascertain it from the various stipulations in the contract (*m*). If, again, there be a usage or custom of trade shown to exist affecting the subject-matter of the contract, such usage or custom, if not inconsistent with, will be imported into the contract, and so will become a term or item of agreement between the contracting parties, who will be presumed to have meant to incorporate the mercantile usage or local custom with their contract (*n*).

The transfer of property may take place either upon or after delivery (*o*). For instance, where anything remains to be done by the seller of the goods which are the subject-matter of the contract, for the purpose of ascertaining their price, as by weighing, measuring, or testing them, the price having been made dependent on the quantity or quality of the goods, the performance of such thing is a condition precedent to the transfer of the property in the goods, even though they be ascertained and are in the

(*m*) See *Calcutta and Burmah Steam Nav. Co. v. De Mattos*, 32 L. J., Q. B. 322; *Dunlop v. Lambert*, 6 Cl. & F. 600, 621.

(*n*) *Syers v. Jonas*, 2 Exch. 111;

Humfrey v. Dale, E. B. & E. 1004.

(*o*) As to what may suffice to constitute evidence of delivery, see *per Erle, C. J., Martin v. Reid*, 11 C. B., N. S. 735.

state in which they ought to be accepted. But this general rule may be modified by the expressed intention of the parties (*p*).

Where a contract is made for the purchase and sale of goods not ascertained, the property therein cannot of course pass immediately to the vendor, but it is quite competent to the vendor and vendee to make whatsoever bargain they please, so as to regulate the vesting of the property in the goods when they have become ascertained and specific, and the courts will endeavour to search out and give effect to such their intention. If goods are ordered from abroad under a contract, showing the intention of the parties to be that the goods shall be shipped by the person who is to supply them, on the terms that when shipped they shall be the consignee's property, and at his risk, so that the vendor shall be paid for them whether delivered at the port of destination or not, this intention is effectual. Such is a very common state of things, and the obligations thence resulting are of this kind:—The vendor's duty is in such case at an end, when he has delivered the goods to the carrier, and if the goods perish in the carrier's hands, the maxim *res perit domino* applies; the vendor is discharged, and the purchaser is bound to pay to him the price of the goods or merchandize (*q*).

As closely connected with this part of our subject, a ^{8t page in}peculiar doctrine of the law demands attention. Where ^{transit.}an unpaid vendor of goods has put them into the hands of a carrier in order to their being by him conveyed and delivered to the vendee; then, if the vendee before actual delivery to him becomes bankrupt or insolvent, the vendor has a right, if he can, to resume possession of the goods, by stopping them *in transitu* (*r*), but his right to do so will

(*p*) *Turley v. Bates*, 2 H. & C. 791—2, 6 E. & B. 355.

200; *Gilmour v. Supple*, 11 Moo. P. C. C. 567.

(*q*) *Dunlop v. Lambert*, 6 Cl. & F. 600; *Wood v. Bell*, 5 E. & B.

(*r*) In regard to the parentage of this right, whether it be the offspring of a court of equity or of law, and likewise in regard to its

be defeated if the consignee of the goods assign over the bill of lading to one who *bond fide* purchases them.

The assignment of a bill of lading is in practice frequent, and so the vendor's right to stop *in transitu* is often set at naught. Thus, a merchant resident in this country, has merchandize consigned to him from abroad; he receives advice that there is a large quantity of the same article ready for shipment to our market; he knows that when these projected consignments arrive the home market will be glutted, and the goods in question depreciated in value. He wishes, therefore, to sell his own cargo immediately, whilst it is at sea, and before it comes to hand, and the profit thus derivable would be fairly gained; accordingly he desires to negotiate the bill of lading, and he would of course be precluded from doing so unless he could thereby legally defeat the right of his consignor to stop *in transitu*. A quick circulation is the life and soul of trade, and if the merchant cannot sell with safety to the buyer, that quickness of circulation must necessarily be retarded (*s*). The right of stoppage *in transitu* exists then, in the event mentioned, where goods have been sold and constructively delivered; delivery to the carrier, whether by land or water, being in law a delivery to the

true nature, obscurity prevails. Sometimes this right of the vendor to stop *in transitu* has been viewed as an equitable lien upon the goods; sometimes regarded as a privilege resulting from his latent *jus proprietatis*; or as a power impliedly reserved to him to rescind the contract of sale under certain circumstances; or as an arbitrary doctrine adopted for the benefit of trade. According to the opinion of Lord Abinger, in *Gibson v. Carruthers*, 8 M. & W. 339, the right of stoppage *in transitu* may be presumed to be a part of the law of merchants, which prevails generally on

the continent, the proof of which, from time to time, by competent evidence, combined with its manifest justice and utility, at length introduced it into the common law of England, of which the law merchant, properly understood, has always been reckoned to form a part. See further as to this, Blackburn, Contract of Sale, Pt. iii. chap. 1.

(*s*) *Per Buller, J., Lickbarrow v. Mason*, 2 T. R. 63; 1 H. Bla. 357.

The rights of the *bond fide* assignee of a bill of lading have been amplified by stat. 18 & 19 Vict. c. 111.

vendee (*t*), and our law regarding the contract of sale as ambulatory and permitting the unpaid vendor at any time before the arrival of the goods at their place of destination, at any time, indeed, before they have got into the purchaser's hands, or the bill of lading has been assigned, to resume possession of the goods, and thus to put himself in the same position as if he had not parted with them. But the right of stoppage *in transitu* cannot be exercised when the transit is terminated (*u*).

Such being the contract of sale and its effect in passing property at common law, certain statutory provisions concerning it must be noticed. Our customary law recognised no distinction between verbal contracts and written contracts not under seal (*x*). It discriminated merely between a deed and a parol contract. To the former sealing and delivery were essential; the latter had to be proved by the testimony of bystanders, by admissions express or implied, or in any way that was available. When, however, writing had become common, and trading operations had expanded, the legislature thought it expedient in some cases to draw a line between written and verbal contracts, and to require proof in writing of an alleged contract for breach of which the plaintiff sued. Such proof has been necessitated by various enactments, the most important of these being the Statute of Frauds.

The Statute of Frauds (*y*) was passed for "prevention of many fraudulent practices which are commonly endeavoured to be upheld by perjury and subornation of perjury;" and by its 17th section enacts, that "no contract for the sale of any goods, wares, or merchandises, for the price of 10*l.* sterling or upwards, shall be allowed to be good except the buyer shall accept part of the goods so sold, and actually receive the same, or give something

(*t*) *Ante*, p. 161.

(*u*) *Heinekey v. Earle*, 8 E. & B.

410.

(*x*) *Rann v. Hughes*, 7 T. R.

350 (a).

(*y*) 29 Car. 2, c. 3.

29 Car. 2, c.
3, s. 17.

Geo. 4, c.
4, s. 7.

in earnest to bind the bargain, or in part of payment (x), or that some note or memorandum in writing of the said bargain be made and signed by the parties to be charged by such contract, or their agents thereunto lawfully authorised." Further, it having been thought doubtful whether this section applied at all to any executory contract, the subject-matter of which did not exist at the time of contracting, or was to be delivered afterwards (a), the 7th section of lord Tenterden's Act (b) extends its operation to all contracts for the sale of goods of the value of 10*l.* and upwards, notwithstanding such goods may be intended to be delivered at some future time, or may not at the time of such contract be actually made, or be fit or ready for delivery, or although some act may be requisite for the making or completing thereof or rendering the same fit for delivery. The above clause of lord Tenterden's Act and the 17th section of the Statute of Frauds are to be read as though incorporated together (c), so that if an order be given for goods made and for others to be made, this will form one entire contract, to which the alternative clauses of the 17th section will have to be applied—for instance, acceptance of the former goods will take the case out of the statutes so as to render a written contract unnecessary as regards the latter also (d).

(c) By our common law, if any part of the price of goods is paid down, if it be but a penny, or any portion of the goods delivered by way of earnest, (which the Roman law calls *arrha*, and interprets to be *emptiois-venditionis contractus argumentum* (Inst. 3, tit. 24)), the property of the goods is absolutely bound, so that the vendee may recover the goods by action, and the vendor may recover the price of them (Noy's Max. c. 42).

Anciently, among the northern nations, shaking of hands was held necessary to bind a bargain. A

sale thus made was called hand-sale, "*venditio per mutuum manuum complexionem*" (Stiernhook de Jure Goth. l. 2, c. 5), till in process of time the same word was used to signify the price or earnest, which was given immediately after the shaking of hands, or instead thereof.

(a) *Per* Littledale, J., *Smith v. Surman*, 9 B. & C. 574.

(b) 9 Geo. 4, c. 14.

(c) *Per* Lord Abinger, C.B., *Scott v. Eastern Counties R. Co.*, 12 M. & W. 33.

(d) As to cases within the above

The general effect of the 17th section of the Statute of Frauds is clear; it nullifies a contract not authenticated in conformity with its requirements (*e*). Serious difficulties have, however, arisen in construing it, and embarrassment has been felt in regard to the sufficiency of the memorandum (*f*) and of the signature (*g*) which will satisfy it; perhaps from amongst such minor difficulties, the most noteworthy points decided are that a proposal in writing signed by the party to be charged and accepted verbally by the party to whom it is made will suffice (*h*), and that where a bought and a sold note, delivered respectively to the buyer and seller of goods by the broker who negotiates their sale, are relied upon as evidencing the contract, a material variance between such notes will preclude them from so doing (*i*). Where an offer to sell goods is made, the bargain is complete when a letter accepting such offer without qualification is put into the post (*j*).

The principal difficulty, however, experienced in construing the 17th section of the Statute of Frauds has arisen on that clause of it which provides as a substitute for a written memorandum of the sale of goods an "acceptance and actual receipt" thereof. It will be conceded that the word "accept" is stronger than the words "actually receive," which must be taken to signify a receipt *animo accipiendi*, and imply a delivery of the possession of the goods—actual as by their bodily transfer, or constructive as by handing over the key of the warehouse in which they are stored to the intended purchaser.

statutes, see *Clay v. Yates*, 1 H. & N. 73, 78.

(*c*) *Noble v. Ward*, L. R. 2 Ex. 135.

(*f*) *Newell v. Radford*, L. R. 3 C. P. 52; *Vandenberg v. Spooner*, L. R. 1 Ex. 316; *Gibson v. Holland*, L. R. 1 C. P. 1.

(*g*) *Caton v. Caton*, L. R. 2 App.

Cas. 127.

(*h*) *Reuss v. Picksley*, L. R. 1 Ex. 342, which was decided under s. 4, as to which, *post*.

(*i*) *Sieversright v. Archibald*, 17 Q. B. 103.

(*j*) *Dunlop v. Higgins*, 1 H. L. Ca. 381; *Adams v. Lindsell*, 1 B. & Ald. 681.

And in most cases the question whether or not the 17th section of the Statute of Frauds has been complied with will be one of fact, and it will be for the jury to say what was the character of the transaction, whether or no the circumstances deposed to show that there was an acceptance and actual receipt of the goods in question (*k*) ; the larger the bulk of the goods as to which a question under the statute arises, the more impracticable would be a manual receipt of them.

Again, if goods sent on approval are retained by the consignee for an unreasonable time, or if acts of ownership are exercised by him over the goods, an acceptance may be inferred or presumed as against the alleged vendee when sued for the value of the goods. If the purchaser of goods by sample re-sells them before objecting to the quality of the goods, he will afterwards be precluded from saying that he has not accepted them within the statute, for he has exercised an indubitable act of ownership over the goods by re-selling them (*l*). And there may be an acceptance and receipt such as to satisfy the statute, and yet the buyer may refuse to carry out the contract on the ground that the goods were not according to it (*m*). Acts, indeed, done at different periods of time may be so connected together as to form one transaction, and therefore it would seem that an acceptance of goods within the statute may be prior to the actual delivery of them (*n*).

Effect of
illegality or
fraud.

It was long since judicially observed that the law is best applied when made subservient to the honesty of a case, and that our law merchant is a system of equity founded on the rules of equity and governed in all its parts by plain justice and good faith (*o*). Such a remark

(*k*) *Bushel v. Wheeler*, 15 Q. B. 442; *Kershaw v. Ogden*, 3 H. & C. 717.

(*l*) *Morton v. Tibbett*, 15 Q. B. 428.

(*m*) *Smith v. Hudson*, 6 B. & S. 431, 450.

(*n*) Compare *Reuss v. Picksley*, L. R. 1 Ex. 351—2; and cases there cited; *Morton v. Tibbett*, *supra*; *Hunt v. Hecht*, 8 Exch. 814.

(*o*) *Master v. Miller*, 4 T. R. 335, 342.

forcibly applies in regard to the contract of sale, which cannot be allowed to stand if tainted by illegality or fraud.

Not only is a contract made in direct contravention of ^{Illegality.} the statute law null and of no effect, but if two parties enter into an agreement whereby it is stipulated that one of them shall be enabled to commit an act contrary to the provisions of a statute, though not expressly prohibited thereby except by the imposition of a penalty, the agreement is illegal and void (*p*). This principle is sometimes applicable in an action for the price of goods. Statutes affecting the right to recover the price of goods by a vendor who has failed to comply with their requirements are of two kinds; the one class of statutes having for its object the raising and protection of the revenue, the other class being directed either to the protection of buyers and consumers, or to some object of public policy. In connection with the first-mentioned of these two classes the difficulty most likely to occur to the practitioner will be in determining whether the infliction of a penalty was meant by the legislature to imply a prohibition of the contract. In connection with the latter class, the inquiry will most likely be whether by reason of the vendor's non-compliance with certain statutory provisions, the law will decline to imply a promise by the purchaser to pay for the goods sold (*q*).

Again, from the current of reported cases we collect, ^{Fraud.} that where any one has by fraud or wilful misrepresentation induced another to contract or to part with goods under the belief that such representation was true, a fraud has been committed which will not be tolerated by our law. And the fact that such fraud was practised may be alleged with a view to annulling the contract, and to compelling restitution of property transferred or money

(*p*) *Ritchie v. Smith*, 6 C. B. 462,
477.

(*q*) *Cundell v. Dawson*, 4 C. B.
378.

paid in pursuance of it (*r*). Fraud destroys a contract *ab initio*, so that a fraudulent seller is precluded from setting up and insisting on the contract,—a fraudulent purchaser gets no title under it. Such, doubtless, is the general principle to be applied; a question of more nicety is this—What misstatement will—what will not—vitiate a contract? (*s*) It is clear that if the vendor of a chattel, during the negotiations preliminary to its sale, place fairly before or within reach of the intended purchaser facts and documents whence may be drawn right inferences as to its value, and if the purchaser do not choose to avail himself of the means of knowledge thus afforded, or if he fail in deducing true inferences from them, he will have but himself to blame should the purchase prove disadvantageous, for a vendor is not bound in law to explain fully and completely everything which he may be cognizant of affecting the value of the property which is the subject-matter of the contract. Statements, moreover, false, but collateral to the contract, cannot be made available to nullify it. Still less can the expression of an opinion by the vendor, the grounds and reasonableness of which may be examined by the vendee, be relied upon to vitiate the contract. The representation, to avail for such purpose, must be shown to have given rise to the contracting of the other party—there must have been *dolus dans locum contractui*—fraud inducing to the contract—in order that the vendee may obtain relief from the contract into which he has thus fraudulently been induced to enter.

(*r*) Fraud avoids a contract only where it is the ground of the contract, and where, unless it had been employed, the contract would never have been made; *per* Lord Wensleydale, *Smith v. Kay*, 7 H. L. Cas. 750; *Murray v. Mann*, 2 Exch. 538.

(*s*) As to the mode of resolving

the question *supra*, see *Attwood v. Small*, 6 Cl. & F. 232, 413, 444, from which case, although decided with reference to realty, principles are deducible quite apposite to a sale of goods. As to contracts for the sale of land, or any interest therein, *ante*, vol. ii.

The fundamental rule, however, that fraud will vitiate everything, is sometimes modified by circumstances, *ex. gr.*, where a person has by fraud been induced to contract, he may elect whether he will adopt the contract or repudiate it; and if, with notice of the fraud, he adopts the contract, he cannot afterwards repudiate it (*t*). Further, where a contract of sale has intervened, preference will sometimes be given to the title of an honest purchaser over that of a vendor who has been cheated and defrauded of his goods. If A., through B.'s fraud, be induced to contract with him for the sale of goods, and the goods be delivered to B. in pursuance of the contract, and B. transfer them *bonâ fide* and for value to C., C. will have a good title as against A., who afterwards seeks to disaffirm the contract into which he has been inveigled (*u*). The spirit of this proposition favours the quieting of titles to chattel property, and so tends to the expansion of trade, which most flourishes when confidence is best assured.

Nay, in favour of the contract of sale, and to give security to titles resting upon it, our customary law long since deviated from its well-established doctrine, that the absolute owner of a chattel cannot be prejudiced, so far as concerns his right therein, by the act of a third person in reference to it done in his absence without his acquiescence or knowledge, for the general rule is, that the sale of anything vendible, in market overt, (that is, open), shall not only be good between the parties thereto, but also be binding on all those who have any right of property therein (*x*). And for this purpose, the Mirror (*y*) informs us, were tolls established in markets, viz. to testify the making of contracts; for every private contract was discountenanced by law: insomuch, that our

Sale in market overt.

(*t*) *Rogers v. Hadley*, 2 H. & C. 247.

(*x*) 2 Inst. 713. *Case of Market Overt*, 5 Rep. 84.

(*u*) *White v. Garden*, 10 C. B. 919.

(*y*) C. 1, § 3.

Saxon ancestors prohibited the sale of anything above the value of twenty pence, unless in open market, and directed every bargain and sale to be contracted in the presence of credible witnesses (*z*). Market overt in the country is only held on the special days, provided for particular towns by charter or prescription; but in London every day, except Sunday, is market day (*a*). The market place, or spot of ground set apart by custom for the sale of particular goods, is also in the country the only market overt (*b*); but in London every shop in which goods are exposed publicly to sale, is market overt, for such things only as the owner professes to trade in (*c*). But a sale by sample is not entitled to the privileges of a sale in market overt (*d*).

If, then, my goods are stolen from me, and sold, out of market overt, my property in them is not altered, and I may take them wherever I find them. And it is expressly provided by statute 1 Jac. 1, c. 21, that the sale of any goods, wrongfully taken, to any pawnbroker in London, or within two miles thereof, shall not alter the property: for this, being usually a clandestine trade, is therefore made an exception to the general rule. And, even in market overt, if the goods be the property of the crown, such sale (though regular in all other respects) will in no case bind it; though it binds infants, idiots, or lunatics, and men beyond sea or in prison.

So likewise, if the buyer know the property not to be in the seller; or there be any other fraud in the transaction; if he know the seller to be an infant, or feme covert not usually trading for herself; if the sale be not originally and wholly made in the fair or market, or not at the usual hours; the owner's property is not bound

(*z*) Leg. Ethel. I., 3; Leg. Edg. E. 326; *Lec v. Bayes*, 18 C. B. 601.
Anc. Laws and Inst. Eng. p. 116.

(*a*) Cro. Jac. 68.

(*b*) Godb. 131.

(*c*) *Lyons v. De Pass*, 11 Ad. &

(*d*) *Crane v. London Dock Co.*,
5 B. & S. 313.

thereby (*e*). If a man buys his own goods in a fair or market, the contract of sale shall not bind him, so that he shall render the price; unless the property had been previously altered by a former sale (*f*). And, notwithstanding any number of intervening sales, if the original vendor, who sold without having the property, comes again into possession of the goods, the original owner may take them, when found in his hands who was guilty of the first breach of justice (*g*). By which wise regulations the common law has secured the right of the proprietor in personal chattels from being divested, so far as was consistent with that other necessary policy, that purchasers, *bond fide*, in an open and regular manner, should not be afterwards put to difficulties by reason of the previous knavery of the seller, though the title of one who honestly purchases a stolen chattel in market overt may be defeated, should its owner prosecute the thief to conviction (*h*).

But there is one species of personal chattels, in which the property is not easily altered by sale, without the express consent of the owner (*i*). For the owner's property in a horse that has been stolen is not divested, unless it be sold in a fair or market overt, according to the directions of the statutes 2 Ph. & M. c. 7, and 31 Eliz. c. 12; by which it is enacted, that the horse shall be openly exposed, in the time of such fair or market, for one whole hour together, between ten in the morning and sunset, in the public place used for such sales, and not in any private yard or stable; and afterwards brought by both the vendor and vendee to the book-keeper of such

Sale of
horses.

(*e*) 2 Inst. 713, 714; *Peer v. Humphrey*, 2 Ad. & E. 495.

(*f*) Perk. § 93.

(*g*) 2 Inst. 713.

(*h*) 24 & 25 Vict. c. 96, s. 100; *Scattergood v. Sylvester*, 15 Q. B. 506.

A metropolitan police magistrate

may order the restitution of stolen property under the stat. 2 & 3 Vict. c. 71, ss. 27, 40. See also stats. 10 & 11 Vict. c. 82, s. 12; 18 & 19 Vict. c. 126, ss. 1, 8; 21 & 22 Vict. c. 73, ss. 1, 2.

(*i*) 2 Inst. 719.

fair or market: that toll be paid, if any be due; and if not, one penny to the book-keeper, who shall enter down the price, colour, and marks of the horse, with the names, additions, and abode of the vendee and vendor; the latter being properly attested. Nor shall such sale take away the property of the owner, if within six months after the horse is stolen he puts in his claim before some magistrate, where the horse shall be found; and, within forty days more, proves such his property by the oath of two witnesses, and tenders to the person in possession such price as he *bond fide* paid for him in market overt. But in case the requirements before mentioned be not complied with, such sale is utterly void; and, under the former of the two acts, the owner shall not lose his property, but at any distance of time may seize or bring an action for his horse, wherever he happens to find him (*k*).

Warranty.

Of title.

By the civil law (*l*) an implied warranty was annexed to every sale, in respect to the title of the vendor; but by our law no warranty of title is implied upon the sale of goods, although upon this abstract rule numerous exceptions are engrafted,—as where goods are sold by a shop-keeper in the ordinary course of his business, or under an executory contract, or under circumstances from which a jury may infer a warranty (*m*).

Of quality.

The law concerning implied warranty of the quality of goods sold (*n*) does not admit of being very concisely stated; to avoid prolixity it is below set forth in a series of propositions based respectively upon the authorities cited in the margin, and clothed for the most part in judicial language (*o*).

(*k*) See *North v. Jackson*, 2 Fost. & F. 198.

(*l*) Dig. 21, 2, 1.

(*m*) *Baguley v. Hawley*, L. R. 2 C. P. 625, 628, and cases there cited.

(*n*) An express warranty must be made at the time of sale, or be in-

corporated with the contract; it will otherwise be inoperative, as having no consideration to support it. *Roscorla v. Thomas*, 3 Q. B. 234.

(*o*) See judgm. *Jones v. Just*, L. R. 3 Q. B. 262. 3.

1st. Where goods are *in esse*, and may be inspected by the buyer, and there is no fraud on the part of the seller, the maxim *caveat emptor* applies; the purchaser takes them at his risk, even though the defect which exists in them is latent, and not discoverable on examination,—at least where the seller is neither the grower nor the manufacturer. The buyer in such a case has the opportunity of exercising his judgment upon the matter, and if the result of his inspection be unsatisfactory, or if he distrust his own judgment, he may, if he chooses, require an express warranty. In such a case it is not an implied term of the contract of sale that the goods are of any particular quality or are merchantable (*p*).

2ndly. Where there is a sale of a definite existing chattel, specifically described, the actual condition of which is capable of being ascertained by either party, there is no implied warranty as to quality (*q*).

3rdly. Where a known, described, and defined article is ordered of a manufacturer, although stated to be required by the purchaser for a particular purpose, still, if the known, described, and defined thing be actually supplied, there is no warranty that it shall answer the particular purpose intended by the buyer (*r*).

4thly. Where a manufacturer, or a dealer contracts to supply an article which he manufactures or produces, or in which he deals, to be applied to a particular purpose, so that the buyer necessarily trusts to the judgment or skill of the manufacturer or dealer, a warranty is inferred that the said article shall be reasonably fit for the purpose to which it is to be applied. In such a case, the buyer trusts to the manufacturer or dealer, and relies upon his judgment (*s*).

(*p*) *Parkinson v. Lee*, 2 East, 314.

(*q*) *Barr v. Gibson*, 3 M. & W. 390.

(*r*) *Chanter v. Hopkins*, 4 M. &

W. 399; *Ollivant v. Bayley*, 5 Q. B. 288.

(*s*) *Brown v. Edgington*, 2 M. & Gr. 279.

5thly. Where a manufacturer undertakes to supply goods manufactured by himself, or in which he deals, but which the vendee has not had an opportunity of inspecting, it is an implied term in the contract that a merchantable article shall be supplied (*t*).

6thly. Another class of cases is that of goods bought under a specified commercial description by sample or even after inspection of bulk. Here it is an implied term, notwithstanding the sample or inspection, that the goods shall reasonably answer the specified description in its commercial sense. The sample in any such case is looked upon as a mere expression of the quality of the article, not of its essential character, and notwithstanding the bulk be fairly shown or agree with the sample, yet if from adulteration or other cause, not appearing by the inspection or sample, though not known to the seller, the bulk does not reasonably answer the description in a commercial sense, the seller is liable. So that neither inspection of bulk nor use of sample absolutely excludes an inquiry whether the thing supplied was otherwise in accordance with the contract (*u*).

Within the scope of one or other of the foregoing propositions a state of facts involving a question as to implied warranty of goods sold will probably be found to fall, and where title or quality is expressly warranted the remarks made at a former page (*x*) are applicable. A question, however, of much practical importance, and by no means free from difficulty, here presents itself. Every contract of sale involves two things, the bargain and the transfer of the property to which it has relation (*y*), and whether an action is brought for the non-delivery or non-

(*t*) *Laing v. Fidgeon*, 4 Camp. 169, 6 Taunt. 108; *Shepherd v. Pybus*, 3 M. & Gr. 868; *Bigge v. Parkinson*, 7 H. & N. 955; *Jones v. Just*, L. R. 3 Q. B. 197.

(*u*) *Mody v. Gregson*, L. R. 4

Q. B. 49, 55-6; *Macfarlane v. Taylor*, L. R. 1 Sc. App. 245.

(*x*) *Ante*, p. 156.

(*y*) *Crane v. London Dock Co.*, 5 B. & S. 317.

acceptance of goods, or in respect of their defective quality, a criterion may be needed for determining the proper measure of damages applicable for such breach of contract. Generally speaking, it is that amount of pecuniary loss which might be reasonably expected in the ordinary course of things to flow from the non-fulfilment of the contract, and to be the natural consequence of it. Damage, however, which actually flowed from the breach of contract may chance to be irrecoverable. Thus the buyer of an article may have sustained a loss from the non-delivery of such article, which he intended to apply to a special purpose, and which, if applied to that special purpose, would have been productive of a certain special amount of profit. Yet the seller cannot be called upon to make good that loss, if it was not within the scope of his contemplation that the thing would be applied to the purpose from which such special profit might result. But the seller should pay damages only to the extent to which he contemplated that, in the event of his not fulfilling his contract by the delivery of the article, the profit which would be realised if the article had been delivered would be lost to the other party—to that extent he ought to pay; for the buyer has lost the larger amount, and there can be no hardship or injustice in making the seller liable to compensate him in damages so far as the seller understood and believed that the article would be applied to the ordinary purposes to which it was capable of being applied (z).

2. A guarantie is a mercantile instrument of much practical importance, which may be under seal, though it is oftener evidenced by writing not under seal. It is within the scope of the fourth section of the Statute of Frauds, which, *inter alia*, enacts that—"no action shall be brought whereby to charge the defendant upon any special

2. Guarantie.

(z) *Per* Cockburn, C. J., *Cory v. Ogle v. Earl Vanc*, L. R. 3 Q. B. 272.
Thames Iron Works Co., L. R. 3 Q. B. 190, and cases there cited;

promise to answer for the debt, default, or miscarriages of another," unless the "agreement" upon which such action is brought, or some memorandum or note thereof be in writing signed by the party to be charged therewith, or some person thereunto by him lawfully authorized.

The party signing a guarantie thereby undertakes that he will, on the happening of a contingency, become answerable for the debt or default of a third person, and any such undertaking or engagement must, by virtue of the statute, be in writing; if verbal only, "no action shall be brought whereby to charge the defendant" thereupon.

To fall within the statute, however, the promise must be to answer for the debt, default, or miscarriage of another person for which that other remains liable; *ex. gr.*, the defendant, in consideration that the plaintiff would deliver his horse to A., promised that A. should redeliver him safe; this was held to be a collateral undertaking for another, and therefore not enforceable by action without writing; for "where the undertaker comes in aid only to procure a credit to the party, in that case there is a remedy against both, and both are answerable according to their distinct engagements; but where the whole credit is given to the undertaker, so that the other party is but as his servant, and there is no remedy against him, this is not a collateral undertaking" (a). The difference indeed is obvious between a guarantie and a substitution of liability—between the case where the liability of the party originally liable is extinguished and determined, and the case where there is an assumption of liability upon a contingency—the contingency, *viz.*, of some one else making a default in payment (b). A promise within

(a) *Birkmyr v. Darnell*, Salk. 27; *Mallet v. Bateman*, L. R. 1 C. P. 163, shows that a contract

to give a guarantie must be in writing.

(b) *Forth v. Stanton*, 1 Wms. Saund. 211.

the statute must be made to that person to whom another is or is about to become chargeable (c).

The policy of that particular clause of the 4th section of the Statute of Frauds now spoken of, obviously was to diminish fraud and perjury, which either had been found by experience, or were judged likely to arise from trusting to evidence of less authority than that of a written document, for fixing upon a defendant responsibility for a debt or default for which another person was primarily liable. The clause in question was at first thought to have effected its object, but a mode of evading it was devised by shaping the demand, not upon a special promise of the defendant—which alone is within the letter of the statute—but upon a wrong or tort occasioned to the plaintiff by some false or fraudulent representation of the defendant, made in order to induce him (the plaintiff) to contract with some third person, evidence of such representation when oral only and insufficient therefore, by reason of the statute, to support an action *ex contractu*, being relied upon to sustain an action founded upon tort (d). A practice thus crept in of fixing a person with the debt of another by verbal evidence of a representation as to the solvency or trustworthiness of that other, and proof that credit was given on the faith of that representation, and damage sustained consequent on its incorrectness (e). To support such an action proof of fraud was of course needed (f), but a jury would be prone to infer fraud from very slight and insufficient proofs. In order therefore to remedy the inconvenience resulting from the systematic evasion of the Statute of Frauds thus resorted to, an evasion for repression of which our common law was ineffectual, Lord Tenterden introduced into the statute 9 Geo. 4, c. 14, a section (the 6th) enacting that no action shall

(c) *Hargreaves v. Parsons*, 13 M. & W. 561; *Cripps v. Hartnoll*, 4 B. & S. 414.

(d) *Lyde v. Barnard*, 1 M. & W. 101.

(e) *Per Parke, B., Id.*

(f) *Post*, chap. x.

be brought whereby to charge any person upon any representation made concerning the credit, trade, or dealings of any other person to the intent that such person may obtain credit, money, or goods upon it, unless such representation be made in writing, signed by the party to be charged therewith.

There can be no doubt that the above clause of Lord Tenterden's Act has operated beneficially, has prevented much vexatious litigation, and has put a stop to the attempts which had before been successfully made to elude the provisions of the Statute of Frauds having reference to guaranties. This section affects the nature of the evidence which must be adduced to support an action for false representation, not the general principles of law upon which it rests. To sustain such an action there must be injury and damage, and, if proof of these be present, the jury will have to say whether the former produced the latter, for the damage laid and relied upon by the plaintiff must have resulted not too remotely from the alleged injury in order that an action for false representation may be maintainable. Further, as regards the evidence requisite to support such an action: If a comparison be instituted between the 6th section of Lord Tenterden's Act and the 4th section of the Statute of Frauds, we shall find that under the former statute no action can be maintained against a man for falsely representing his friend to be a person of substance, or as one to whom credit might fairly be extended, unless such representation be in writing, signed by himself; whereas, under the 4th section of the Statute of Frauds, one may be sued on an ordinary guarantie to be answerable for another's debt if the promise to pay be given in writing, signed by his authorised agent, *i. e.*, on the Statute of Frauds a person is exposed to be charged by the verbal statement of another that he had authority to sign; under Lord Tenterden's Act this is not so (*g*).

(*g*) *Lyde v. Barnard*, 1 M. & W. 104.

The word "agreement," used in the 4th section of the Statute of Frauds, has been held to include the consideration as well as the promise which it supports (*h*), and, in construing a guarantie worded by persons unskilled in legal technicalities, a question often arose of this kind: Did the consideration sufficiently appear on the face of the instrument, or was it to be necessarily inferred from the wording of it? (*i*) The difficulty experienced in solving this question has been removed by the 3rd section of the Mercantile Law Amendment Act (19 & 20 Vict. c. 97), enacting that no guarantie shall be deemed invalid to support an action by reason only that the consideration for the promise does not appear in writing or by necessary inference from the written document. This statutory provision does not render a consideration unnecessary to a valid guarantie, it merely dispenses with the necessity of disclosing or indicating the existence of such consideration upon the instrument itself (*k*). Now as formerly will a guarantie of a past debt, unless supported by some other consideration, be inefficacious; now as formerly may a nice and difficult question arise upon a guarantie of this kind:—Do its terms clearly import that the defendant's promise was to guarantie a debt previously incurred? or do they point rather in this direction and to this understanding between the parties, that credit shall continue to be extended and additional goods be supplied or money be advanced by the plaintiff to the person guarantied? (*l*) Fraud and misrepresentation at its inception (*m*), or a

(*h*) *Wain v. Warlters*, 5 East, 10.

(*i*) It was held sufficient in any case, if the memorandum relied upon was so framed that any person of ordinary capacity must have inferred from the perusal of it, that such, and no other, was the consideration upon which the undertaking was given. *Hawes v. Arm-*

strong, 1 Bing. N. C. 765.

(*k*) The whole promise must still be in writing. *Holmes v. Mitchell*, 7 C. B. N. S. 361.

(*l*) *Hoad v. Grace*, 7 H. & N. 494; *Wood v. Priestner*, L. R. 2 Ex. 66, 282.

(*m*) *Lee v. Jones*, 17 C. B. N. S. 482.

material alteration afterwards made in it (*n*), will vitiate a guarantie, and a guarantie given to or on behalf of a firm will, unless a contrary intention appear, cease upon a change in the constitution of the firm (*o*).

3. Agreement not to be performed within a year.

3. Another clause of the 4th section of the Statute of Frauds enacts that: "No action shall be brought to charge any person upon any agreement that is not to be performed within the space of one year from the making thereof, unless the agreement upon which such action shall be brought or some memorandum or note thereof shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorised." Agreements falling within this provision of the statute are not uncommon. Any contract of service does so which is to continue for a year, yet not to commence until a future day (*p*), or any contract for publishing a serial work meant to extend beyond a year (*q*).

It was long since decided that an agreement falling within this statutory provision must be such as from its terms appears to be incapable of performance within the year. For instance, an action was brought upon an agreement by which the defendant promised for one guinea paid down to give the plaintiff so many on the day of his marriage. The defendant not having been married within a year, the question was whether the agreement ought to have been in writing. This question was answered in the negative, for "where the agreement is to be performed upon a contingent, and it does not appear within the agreement that it is to be performed after the year, there a note in writing is not necessary," but where it appears by the whole tenor of the agreement that it is to be performed after the year,

(*n*) *Bank of Hindustan, China, and Japan v. Smith*, 36 L. J. C. P. 241.

(*o*) 19 & 20 Vict. c. 97, s. 4.

(*p*) *Bracegirdle v. Heald*, 1 B. &

Ald. 722. See *Cawthorn v. Cordrey*, 13 C. B. N. S. 406.

(*q*) *Boydell v. Drummond*, 11 East, 142.

there a note in writing is necessary (*r*). The decision thus given might in truth have rested on another ground, for it is now settled that the above statutory provision applies to such contracts only as are not to be performed on either side within the year (*s*).

The Statute of Frauds further enacts, that in the following cases no verbal promise shall be sufficient to ground an action upon, but at the least some note or memorandum of it shall be made in writing, and signed by the party to be charged therewith, or some one thereunto by him lawfully authorised:—

4. Where an executor or administrator promises to answer damages out of his own estate (*t*), and

4. Promise by executor, &c., to answer damages personally.

5. Where any agreement is made upon consideration of marriage, that is, where a promise is made to do some collateral act in consideration of marriage (*u*).

5. Agreement upon consideration of marriage.

It remains only under this head of our subject to observe that where an agreement is by statute required to be in writing, so also must any alteration of it be, which constitutes, in fact, a new contract (*x*). But though such an alteration of the original contract must be in writing, an agreement to waive or abandon it need not be (*y*); and a verbal alteration of a written contract, where incapable of being enforced in virtue of some statute which renders writing necessary, will not so operate as to prevent either party from recovering on the former contract (*z*).

II. The class of contracts next to be considered comprises such as by mercantile custom and usage, sanctioned

II. Contracts required by

(*r*) *Peter v. Compton*, Skin. 353.

(*s*) *Cherry v. Heming*, 4 Exch. 631; *Smith v. Neale*, 2 C. B. N. S. 67.

(*t*) *Forth v. Stanton*, 1 Saund. 210.

(*u*) *Cork v. Baker*, 1 Stra. 34; *Montacute v. Maxwell*, 1 P. Wms. 618; *Caton v. Caton*, 1 L. R. 2 H.

L. 127; *Jorden v. Money*, 5 H. L. Cas. 185.

(*x*) *Marshall v. Lynn*, 6 M. & W. 117.

(*y*) *Goss v. Lord Nugent*, 5 B. & Ad. 58; *Stead v. Dawber*, 10 Ad. & E. 57.

(*z*) *Noble v. Ward*, L. R. 2 Ex. 135.

mercantile
custom to
be in writ-
ing.

by various enactments, are in writing, *ex. gr.*, bills of exchange (*a*), cheques, promissory notes, banknotes, and certain contracts of loan and insurance, to which we shall advert briefly in the order mentioned.

1. Bill of
exchange.

1. A bill of exchange is a security, invented among merchants, for the more easy remittance of money from one country to another. It is an open letter of request from A. to B., desiring B. to pay a sum named therein to a third person on A.'s account; by which means a man at the most distant part of the world may have money remitted to him from any trading country. If A. lives in Jamaica, and owes B., who lives in England, 1000*l.*, now if C. be going from England to Jamaica, he may pay B. this 1000*l.*, and take a bill of exchange drawn by B. in England upon A. in Jamaica, and receive it when he comes thither. Thus does B. receive his debt, at any distance of place, by transferring it to C.; who carries over his money in paper credit, without danger of robbery or loss. This method is said to have been brought into general use by the Jews and Lombards, when banished, in order the more easily to draw their effects out of France and England, into those countries in which they had chosen to reside. But the invention of it was a little earlier: for the Jews were banished out of Guienne in 1287, and out of England in 1290 (*b*). In mercantile phraseology, such a bill is frequently called a draft. The person who writes this letter is called in law the drawer; he to whom it is written the drawee, and after acceptance, the acceptor; and the third person, to whom it is payable (whether specially named or described as bearer generally) is called the payee.

Inland bill,
parties to.

Bill, how
defined.

A bill of exchange, then, is an order by A. on B. to pay

(*a*) "A bill of exchange is a contract of a very particular nature, depending on the custom of merchants, and must be in writing." *Thomas v. Bishop*, Rep. temp. Hardw. 2. See 19 & 20 Viet. c. 97,

s. 6; 1 & 2 Geo. 4, c. 78, s. 2. Generally as to the stamp on a negotiable instrument, see Tilsley's Stamp Acts.

(*b*) 2 Carte, Hist. Eng. 203, 206.

at such a time after date, or on demand, or at or after sight, a sum certain, and when this order is accepted by B., B. becomes primarily liable to pay the bill, A. being liable to do so in case of B.'s default.

The most remarkable incident or quality attaching to a bill of exchange is its negotiability—its transferability from hand to hand. It was a rule of our common law that a chose in action (c) could not be assigned or granted over (d), because it was thought to be a great encouragement to litigiousness if a man were allowed to make over to a stranger his right of going to law; and, in compliance with this ancient principle, the form of assigning a debt is still in the nature of a declaration of trust, and an agreement to permit the assignee to make use of the name of the assignor, in order to recover possession of the money due. And therefore, when in common acceptance a debt is said to be assigned over, it must be sued for in the original creditor's name; the person to whom it is transferred being rather an attorney than an assignee. But the crown is excepted from the operation of this general rule, and may either grant or receive a chose in action by assignment (e). Various contracts have likewise by mercantile usage, and by express enactment, been withdrawn from its operation, and of such contracts negotiable instruments are the most important.

The payee of a bill of exchange has clearly a property vested in him, not indeed in possession but in action, by the implied contract of the drawer, viz., that, provided the drawee does not accept or pay the bill, the drawer will pay it. And this property, so vested, may, if the bill be

(c) The term "chose in action" includes as well the evidence of a right to sue as the right itself, and in virtue of the rule above mentioned, the document evidencing a right or credit could not, at common law, by passing from hand to

hand, confer upon each successive holder of it a right of action.

(d) Co. Litt. 214; *Dixon v. Bovill*, 3 Macq. Sc. App. Cas. 1.

(e) Dyer, 30. Bro. Abr. tit. *Chose in action*, 1 & 4.

Assignment
of bill.

drawn in the form usual amongst merchants, be transferred and assigned from the payee to any other man; contrary to the general rule of the common law that no chose in action is assignable. This assignment being the life of paper credit, it may be well to mention a few of the principal incidents attending it when regular, and such as to charge the drawer with the payment of the debt to persons other than those with whom he originally contracted.

The quality of negotiability may be imparted to a bill of exchange by the form in which it was originally drawn, or may be communicated to it by indorsement. If indeed the bill be drawn payable to A., A only can sue upon the bill, which in this case will not be at all or in any sense negotiable. If the bill be drawn payable to "A. or order," A. can, by writing his name *in dorso*, or on the back of the instrument, transfer or assign over to another person, called the indorsee, his right and title to it, either generally or specially, in this latter case making the bill payable to B. by name or order. If the bill be drawn payable to "A. or bearer," it will be perfectly negotiable, and may pass, by delivery, from one person to another *in infinitum*, conferring rights and imposing obligations which are very definite and stringent.

The indorsement, however, of a bill of exchange must, in order to be efficacious, have been made *animo indorsandi*, and when thus made and perfected by delivery the effect of the transaction is to vest in the indorsee the sole and exclusive right to sue upon the instrument. When, indeed, we speak of a bill as being transferable by indorsement, we ordinarily mean that the right to the bill and the right to sue upon it will pass from A. to B. if A. write his name upon the back of the bill and deliver it to B., intending to pass it to him as indorsee. And if in an action by indorsee and holder against indorser of a bill *primâ facie* proof be given of the indorsement, the burden will thus be cast on the defendant of showing that the de-

livery of the bill to the plaintiff was not with the intention of constituting an indorsement in its proper legal sense, but was made with a view to effecting some other object (*f*).

Inasmuch as a bill of exchange may be put in circulation whilst unaccepted (*g*), it has been thought convenient to treat of the transfer before treating of the acceptance of a bill, to which latter subject specific reference must now be made. The ordinary course to be pursued by the drawer or holder of an unaccepted bill is this:—The payee, or the indorsee (whether by a general or a particular indorsement) of an unaccepted bill should go to the drawee, and offer his bill for acceptance. If the drawee refuse to accept the bill, the holder may, after giving due notice of dishonour, sue the drawer and indorsers, without waiting till the bill becomes due, according to the terms of it (*h*). If the bill be accepted by the drawee, his obligation is to pay it on the last of the three days (called days of grace) next ensuing that on which it is expressed to fall due (*i*).

As to the requisites and form of the acceptance:—

No acceptance of an inland bill of exchange will be

(*f*) See *Smith v. Johnson*, 3 H. & N. 222; *Marston v. Allen*, 8 M. & W. 494.

(*g*) Acceptance is not necessary, though usual and desirable on bills payable at a certain time; but when the bill is payable at or after sight, then acceptance is essential and should not be delayed; because, as the time for payment of the bill does not begin to run till it is accepted, the responsibility of the drawer might be thereby unreasonably protracted, and the holder would lose his remedy against the other parties. Byles on Bills, 9th ed. 174.

(*h*) *Whitehead v. Walker*, 9 M.

& W. 506.

(*i*) For instance, if a bill or note is dated on the 12th of any month, and made payable ten days, one week, or one month after date, payment must be demanded on the 25th, the 22nd of the same, and on the 15th of the next month respectively. But if the third day of grace falls on a Sunday, the bill or note is payable and due on the Saturday preceding. 39 & 40 Geo. 3, c. 42; 7 & 8 Geo. 4, c. 15.

Days of grace are not allowed upon bills or notes payable on demand; but the rule is perhaps different, if they are made payable at sight. Byles on Bills, 9th ed. 201.

sufficient to bind or charge any person, unless the same be in writing on such bill; or if there be more than one part of such bill, on one of the said parts, and be signed by the acceptor or some person duly authorised by him (*k*).

Further, although no precise form of words is essential to constitute an acceptance (*l*), the distinction must be noticed between a general and a qualified acceptance; a general acceptance of a bill of exchange being an absolute and unqualified acceptance of the bill according to its tenor (*m*), whereas a qualified acceptance is either conditional, or partial, or varying from the tenor of the bill (*n*); thus, the acceptance of a bill of exchange made payable at the house of a banker or other place, without further expression in the acceptance, is, as against the acceptor, a general acceptance of such bill (*o*). The acceptance of a bill payable at the house of a banker or other place only, and not otherwise or elsewhere, is a qualified acceptance of the bill (*p*).

The acceptance of a bill of exchange is not complete until delivery of the bill by the acceptor, or until he has by his acts or language notified to some person interested in the bill that it has been accepted by him (*q*), but when completed, the acceptance creates a primary liability in the acceptor to pay (*r*), and is an engage-

(*k*) 19 & 20 Vict. c. 97, s. 6; 1 & 2 Geo. 4, c. 78, s. 2.

An acceptance "per procura-tion" conveys an intimation of a special authority, as to which the party taking the bill should inquire. *Stagg v. Elliott*, 12 C. B. N. S. 373.

(*l*) *Billing v. Devaux*, 3 M. & G. 565.

(*m*) Judgm. *Rowce v. Young*, 2 Brod. & Bing. 165; *Halstead v. Skelton*, 5 Q. B. 86.

(*n*) *Ex. gr.* "To pay when in

cash for the cargo of the ship *Thetis*" (*Julian v. Shobrooke*, 2 Wils. 9); "to pay 100*l.* part thereof" (*Wegersloff v. Keene*, 1 Stra. 214).

(*o*) 1 & 2 Geo. 4, c. 78, s. 1; Judgm. *Halstead v. Skelton*, 5 Q. B. 86.

(*p*) 1 & 2 Geo. 4, c. 78, s. 1.

(*q*) *Cox v. Troy*, 5 B. & Ald. 474.

(*r*) *Fentum v. Pocock*, 5 Taunt. 192; judgm. *Jones v. Broadhurst*, 9 C. B. 181; judgm. *Gibb v. Ma-*

ment by him to pay according to the tenor of his acceptance (s).

When a bill of exchange has been drawn, accepted, and indorsed, independent and different contracts arise on the parts respectively of those who drew and accepted the bill with the indorsee or holder. The person who accepted the bill is primarily and absolutely liable to pay it; the person who drew the bill is liable only upon the contingencies of default being made by the acceptor, and of the holder's performing certain conditions precedent to his right of suit being complete, viz., presenting the bill, and giving due notice of the failure of the acceptor to pay it upon presentment. The contracts created and evidenced by the bill, so far as regards the principal parties to it, are thus essentially distinct; and according as the action on a bill is brought against this or that party to it, so will the form of declaration in an action framed upon the idea of an undertaking by him necessarily vary. And whatsoever proceedings upon the bill be taken it must be borne in mind that the receipt of a bill of exchange in respect of a debt does not extinguish the debt, it merely postpones the period of payment; and if for some reason or other the remedy upon the bill, when arrived at maturity, fail, a remedy still remains in respect of the original consideration for the bill.

The conditions precedent to enforcing payment of a dishonoured bill as against any party to it intermediate between the holder and the acceptor (who is absolutely liable upon it) are presentment and notice of dishonour.

Conditions
precedent
to enforcing
payment.

Payment of the bill, when refused, must be demanded of the drawer as soon as conveniently may be: for though, when one draws a bill of exchange, he subjects himself to payment of it, if the person on whom it is drawn refuses either to accept or pay it, yet this is subject to a condition that if the bill be not paid when due, the person to whom

ther, 8 Bing. 221; *Tindal v. Brown*,
1 T. R. 167.

(s) Judgm. *Halstead v. Skelton*, 5
Q. B. 93, 94.

it is payable, or the holder, shall in convenient time give the drawer notice thereof; for, otherwise, the law will imply it paid: since it would be prejudicial to commerce, if a bill might rise up to charge the drawer at any distance of time; when meanwhile all reckonings and accounts might have been adjusted between the drawer and the drawee.

If the bill be an indorsed bill, and the indorsee cannot get the drawee to discharge it, he may call upon either the drawer, or the indorser, or, if the bill has been negotiated through many hands, upon any of the indorsers; for each indorser is in the nature of a new drawer, and is a warrantor for the payment of the bill, which is frequently taken in payment as much upon the credit of the indorser as of the drawer. And if such indorser, so called upon, has the name or names of one or more indorsers prior to his own, to each of whom he is properly an indorsee, he is also at liberty to call upon any of them to make him satisfaction; and so upwards. But the first indorser of a dishonoured bill has nobody to resort to but the drawer.

The bill must be presented for payment in due time, that is, on the last of the three days of grace, to the acceptor, if the acceptance be general (*t*), or at the place named upon the bill if the acceptance be qualified.

Present-
ment.

Presentment for payment must be made at the maturity of the bill. It is a well-known rule that where a creditor gives time to his principal debtor, there being a surety to secure payment of the debt, and does so without consent of, or communication with, such surety, the surety is discharged, because he is thus placed in a new situation, and exposed to a risk and contingency to which he would not otherwise, and according to the terms of his undertaking, have been liable (*u*); and although it is quite competent to

(*t*) A bill accepted payable generally at a particular banker's may be presented for payment either to the acceptor personally, or at the

banker's. *Halstead v. Skelton*, 5 Q. B. 92.

(*u*) *Per* Lord Lyndhurst, *Oakley v. Pasheller*, 4 Cl. & F. 233.

a man to give up or renounce a right appertaining to himself alone, he cannot renounce on behalf of another a right which belongs to him; at least, should he assume to do so, our law will protect that other from being prejudiced by the act, and will, perhaps, place him in a position more favourable than that which he had before occupied, and exonerate him from liabilities which had before attached to him. In accordance with the above principle, and on general grounds of expediency, our law will not permit the responsibility of any party to a negotiable instrument intermediate between the holder and the person primarily liable upon it to be prejudiced by any secret understanding between those two persons. If this rule were relaxed, traders would be reluctant to put their names to negotiable paper. The proposition therefore was long since established (v) that the holder of a bill of exchange, by giving time to the acceptor, discharges the other parties to it, for the acceptor of a bill is the party principally, and in the first place, liable upon it; the other parties whose names appear on the instrument as making, drawing, or indorsing it are, in legal contemplation, sureties only (x); and, as above intimated, any private agreement between a creditor and his principal for a variation in the terms of their contract is viewed as a fraud upon the surety, who is accordingly, *ipso facto*, discharged and exonerated from the collateral or contingent liability which he had assumed.

The rule ordinarily applicable is that, in order to charge the drawer of a bill, due notice of dishonour must be given him, the want of notice of dishonour being, indeed, tantamount to payment by him, for the law presumes, regard being had to the usual course of commercial dealing, that the bill is drawn on account of effects of the party who drew it being in the hands of the person upon

Notice of dishonour.

(v) *Tindal v. Brown*, 1 T. R. 167. 19 & 20 Vict. c. 97. s. 5, applies.

(x) To whom, therefore, the stat.

whom it is drawn, and who accepts the bill. If the drawer has notice that the bill is not paid (or not accepted, for the rule applies also to that state of things), he may then at once withdraw his effects from the hands of him upon whom the bill was drawn, and so may possibly protect himself by getting back the consideration for the bill. If, however, the party last named had at the time of drawing the bill no effects in the hands of the drawee, the reason of the rule requiring notice of dishonour fails, and no notice of dishonour need be given him (*y*).

The notice of dishonour must expressly or by reasonable intendment convey information that the bill has been dishonoured, and demand payment of it (*z*), and although no period can be named within which, under all circumstances, it should be given, the rule upon this point has during the last century become tolerably definite, the question what is reasonable notice having been held to be one of law, regard being had however to the particular facts of the case (*a*). Whether the post goes out this or that day, at what time, and so forth, are matters of fact; but where the facts pertinent to the matter agitated are established, it becomes a question of law upon these facts what notice may be reasonable and sufficient. The rule now established as regards the time for giving notice is that the party sought to be charged upon the bill is entitled to "prompt notice" of its dishonour by the acceptor. Where the parties live in the same town the notice should be given in time to be received in the course of the day next after the dishonour of the bill, or after the party giving the

(*y*) *Bickerdike v. Bollman*, 1 T. R. 485, where Buller, J., says—the party drawing the bill "must know whether he had effects in the hands of the drawee or not, and if he had none, he had no right to draw upon him and to expect payment from him, nor can he be injured by the non-payment of the bill, or the want

of notice that it has been dishonoured." *Carter v. Flower*, 16 M. & W. 748.

(*z*) *Solarte v. Palmer*, 2 Cl. & F. 93; *Lewis v. Gompertz*, 6 M. & W. 402, 3.

(*a*) *Blesard v. Hirst*, 6 Burr. 2670; *Tindal v. Brown*, 1 T. R. 167.

notice had himself received notice of dishonour. There must be due diligence: not that the party is bound to neglect all other business and the moment he receives notice send a notice to those he means to charge. He has a whole day, and so much more as will enable him, using due diligence, to communicate the notice to the party sought to be charged. If there are many indorsers, and the notice in fact travels through them all—if there has been no want of diligence between any two of them—whatever time is occupied the notice will be good. The rule is not imperative that each indorser has a day, but rather that due diligence shall be observed (*b*).

It is an elementary rule that, to support a simple contract, some sort of consideration is essential, a mere voluntary courtesy will not uphold an assumpsit (*c*). The rule applies generally to simple contracts. There is, however, this peculiarity about a bill of exchange that the consideration for the promise evidenced by it will, in the first instance, be presumed. As between the immediate parties to a bill of exchange the *onus* lies on the defendant of showing—by an apt plea and by apt evidence—that he transferred it to the holder without consideration, and that therefore he cannot at suit of the plaintiff be made liable upon the bill. The drawer of an accommodation bill cannot successfully sue the acceptor upon it, and is even liable to be called on to indemnify him if compelled to take up the bill (*d*). As between parties to a bill of exchange not immediate, the rule is settled that if the defendant in an action upon the bill adduces evidence of fraud connected with its inception, or with its original transfer, the *onus* is thus cast upon the plaintiff of proving that he is a holder of the bill for value. Indeed the presumption in favour of the holder of a bill can only be

Consideration for bill.

(*b*) *Tipper v. Rowe*, 13 C. B. 249.

Generally, as to the necessity of presentment and notice of dishonour, see *Rushton v. Aspinall*,

Doug. 654; *Heylin v. Adamson*, 2 Burr. 669.

(*c*) *Ante*, p. 157.

(*d*) *Beech v. Jones*, 5 C. B. 696.

in the case of a genuine instrument. If once a bill is shown to be tainted with illegality or fraud, the presumption of *bona fides*, which ordinarily arises from the indorsement ceases, and *a fortiori* if the instrument is proved to have been forged (*e*).

Negotiable instruments form an important part of the currency of the country, and are therefore subjected to the operation of a fundamental rule applicable to money. If such an instrument be transferred in good faith for value before it is overdue, it becomes available in the hands of the holder, notwithstanding fraud which would have rendered it unavailable in the hands of a previous holder; though if a bill of exchange be payable to order, the holder of the bill must perfect his title to it by indorsement in order that he may not be affected by notice of a fraud tainting the instrument perpetrated before it came to his hands. Upon the maxim, *nemo plus juris ad alium transferre potest quam ipse habet*, which comes to us from the Roman law (*f*), has thus been engrafted an exception with a view to facilitating commercial dealings, and for promoting confidence amongst traders in the paper which they circulate. But the operation of this exception has likewise, with a view to the maintenance of good faith and the suppression of fraud, been, in accordance with equitable principles, limited and restrained (*g*).

Procedure
on bill.

As a general rule no one whose name does not appear upon a bill of exchange can be sued on it, and no one except the holder can sue upon it (*h*). The holder moreover

(*e*) *Mather v. Lord Maidstone*, 1 C. B. N. S. 273.

(*f*) Dig. 50, 17, 54.

(*g*) *Whistler v. Forster*, 14 C. B. N. S. 248.

The unauthorised alteration of a bill of exchange, if material (*Aldous v. Cornwell*, L. R. 3 Q. B. 573), though made by a stranger, will vitiate it. *Master v. Miller*, 4 T.

R. 320; 2 H. Bla. 140; *Hirschfeld v. Smith*, L. R. 1 C. P. 340.

(*h*) The holder of a bill may bring actions against the acceptor, drawer, and all the indorsers at the same time; but though he may obtain judgments in all the actions, yet he can recover but one satisfaction for the value of the bill. See also 18 & 19 Vict. c. 67, s. 6.

of such a negotiable instrument suing upon it may be called on by an apt plea to produce it at the trial. This tends to prevent fraud, and to protect a defendant, who obviously ought not to be in peril of paying the bill twice over. It is also in conformity with the practice of merchants having reference to the payment of the instrument in ordinary course. By the custom of traders the holder of a bill of exchange should (as already stated (i)), present it at maturity to the acceptor, demand payment of its amount, and upon receipt of the money deliver up the bill; the acceptor, upon paying the bill, having a right to its possession for his own security, and as his voucher and discharge *pro tanto* in the account between himself and the party who drew upon him (k).

The rule above stated was in its policy sound, as perhaps might be said of almost every rule adopted into the practice of merchants, originating in necessity and tested by long experience. Nevertheless the particular rule adverted to might occasionally, if not relaxed, be productive of hardship—perhaps might work positive injustice. The holder of a bill of large amount losing it through the negligence of a clerk or other agent, in the absence of personal default, might be without remedy upon it. Therefore the legislature interposed, and by section 87 of the second Common Law Procedure Act (17 & 18 Vict. c. 125), enacted that in case of any action founded upon a bill of exchange or other negotiable instrument, it shall be lawful for the court, or a judge, to order that the loss of such instrument shall not be set up, provided a satisfactory indemnity be given against the claims of any other person upon such instrument.

The procedure upon a bill or note has also been simplified and amended by the under-mentioned statute (l).

(i) *Ante*, p. 190.

(k) Judgm. *Hansard v. Robinson*,
7 B. & C. 90, 94.

(l) 18 & 19 Vict. c. 67, which

provides that a writ of summons in a special form may, within six months after a bill of exchange or promissory note has become due

Foreign bill. An inland bill of exchange is drawn and payable here, or drawn in one part and payable in any other part of the British Islands (*m*). A bill drawn or payable elsewhere is (except for stamp purposes (*n*)) a foreign bill (*o*). Such a bill is usually drawn in parts which circulate together, at one or more "usances," the "usance" being the period for payment customary as between the places at which respectively the bill is drawn and made payable.

The acceptance of a foreign bill of exchange in this country might formerly have been written or oral, or evidenced by the conduct of the acceptor (*p*); now, however, no acceptance of a foreign bill of exchange will suffice to charge any person unless it be in writing on such bill, or on one part of such bill, and be signed by the acceptor, or some person duly authorised by him (*q*).

Payment of any part of a foreign bill is conditional on the other parts of like tenor and date as itself remaining unpaid at maturity; and if default be made in payment, the bill must be protested by a notary before proceedings can be taken upon it. If acceptance of such bill be refused, it may be accepted *supra* protest, for "the honour

and payable, be issued, and to this writ an appearance within twelve days from the date of service, can only be entered by leave of a judge on disclosing good grounds of defence, or on payment into court of the sum indorsed on the writ. On an affidavit of service, or leave given to proceed, final judgment may, in case of the defendant's non-appearance, be signed, and execution may be had thereupon. Leave to appear to the writ may, however, under special circumstances, be given, even after judgment, execution in this case being either stayed or set aside.

See *Agra Bank v. Leighton*, L. R.

2 Ex. 56.

(*m*) Great Britain, Ireland, Man, Guernsey, Jersey, Alderney, and Sark. 19 & 20 Vict. c. 97, s. 7.

(*n*) *Griffin v. Weatherby*, L. R. 3 Q. B. 753.

(*o*) As to the stamp thereon, see 17 & 18 Vict. c. 83, s. 5. (*Pooley v. Brown*, 11 C. B. N. S. 566.) 27 & 28 Vict. c. 56, s. 2.

(*p*) *Clarke v. Cock*, 4 East, 57; *Wynne v. Raikes*, 5 *id.* 514; *Harvey v. Martin*, cited 1 Camp. 425; *Judgm. Jeune v. Ward*, 1 B. & Ald. 653, 657.

(*q*) 19 & 20 Vict. c. 97, s. 6, operative from Dec. 31, 1856.

of" the drawer or any indorser by a stranger, who thereby undertakes to pay the bill if the drawee or indorser do not (*r*); the party for whose honour the acceptance was thus made, and all antecedent parties to the bill, being liable to the acceptor *supra protest*, for damages which he may incur by reason of his acceptance (*s*).

The most serious difficulty arising upon a foreign bill is where a conflict occurs between the laws of the country in which it was drawn, accepted, or indorsed, and those which here obtain. The maxim *lex loci regit actum* needs here to be applied—sometimes under perplexing circumstances (*t*).

2. The relation of banker and customer is of this ^{2. Cheque.} kind:—The banker is the depositary of the customer's money, which he, in compliance with usage, undertakes to pay out from time to time to the customer's order evidenced by his cheque. A cheque is in fact an inland bill of exchange, drawn upon the banker, and payable to the bearer on demand (*u*). It differs however from a bill in some particulars, for instance, whereas a bill of exchange is drawn upon a person who is expected to, and in the ordinary course does, accept it, a common cheque, though drawn upon a banker, is not accepted by him; it is understood to be a request or order to pay money *instantly* when the order is presented, and accordingly does not need to be accepted (*x*). A cheque passes from hand to hand upon the faith reposed in the maker of it, and a confidence that there are funds to his credit at the banker's sufficing for liquidation of the cheque. Further, as a cheque upon a banker is not usually accepted, so neither is it usually in-

(*r*) *Hoare v. Cazenove*, 16 East, 391. See 6 & 7 Will. 4, c. 58.

(*s*) Byles on Bills, 9th ed. 259.

(*t*) See, for instance, *Bradlaugh v. De Rin*, L. R. 3 C. P. 538; *Lebel v. Tucker*, L. R. 3 Q. B. 77.

(*u*) The idea of negotiability as

attaching to an instrument analogous to a banker's cheque was not made definite prior to the decision in *Grant v. Vaughan*, 3 Burr. 1516.

(*x*) Days of grace are not allowed upon a cheque.

dorsed. It may, however, be so, and an action will then lie by the holder against an indorser of the instrument (*y*). The crossing of a cheque, which indicates that it must be passed through a banker's for presentment, is another characteristic of this instrument (*z*).

Upon the implied undertaking of the banker his liability to a customer almost wholly depends, and any breach of duty by the banker causing direct damage to his customer would be actionable (*a*). A banker having in hand sufficient funds of a customer, is bound to honour his cheque, and liable in an action founded on contract or breach of duty for not doing so (*b*). The banker must decide as to the genuineness of a cheque drawn upon him, and should he pay a forged cheque, must, in the absence of gross negligence by his customer, bear the loss (*c*). If a bill be accepted by a customer, payable at his banker's, the making the acceptance payable there is tantamount to an order on the part of the acceptor that the banker shall pay the bill to the person who, according to the law merchant, may be capable of giving a good discharge for it. Supposing that the bill has in this case been originally made payable to order, the acceptance payable at a banker's operates as authorising him to pay the bill to any one who shall become holder of it by a genuine indorsement. Supposing, again, that the bill has been originally made payable to bearer, the acceptance payable at a banker's operates as authorising him to pay the bill to any one who seems to be the holder of it. The banker impliedly undertakes to pay the bill accordingly, *i. e.* in strict pursuance of, and in conformity with the authority given to him by his customer. He cannot, therefore,

(*y*) *Keene v. Beard*, 8 C. B. N. S. 372.

(*z*) 19 & 20 Vict. c. 95; 21 & 22 Vict. c. 79, ss. 1, 3.

(*a*) *Hardy v. Veasey*, L. R. 3 Ex. 107.

(*b*) *Marzetti v. Williams*, 1 B. & Ad. 415; *Gray v. Johnston*, L. R.

3 App. Cas. 1.

(*c*) *Young v. Grote*, 4 Bing. 253; *Hall v. Fuller*, 5 B. & C. 750.

debit his customer's account with any payment not made in accordance with such authority (*d*).

The ordinary period of limitation, viz., six years, runs, of course, as against the recipient and holder of a cheque. A question, however, may arise of this kind. Is the holder entitled to retain the cheque thus long without a possibility of being in that interval prejudiced as regards his remedy against the maker of the cheque, by the delay in presenting it for payment. For resolving this question, a rule has been found needful, defining the period within which presentment of a cheque must be made in order that the holder of it may, in case of failure of the banker on whom it is drawn, have redress against the party who transferred the cheque. The holder of the cheque is bound to present it for payment on the day after that on which he received it, or if the cheque be on a banker in a distant town, the holder is bound to send it to his agent there for presentment by the post of the day after that on which he had it, the agent having the following day in which to present the instrument for payment (*e*). This rule has been held to apply not merely as between the parties to the cheque, but as between the banker and his customer, unless, indeed, circumstances exist where a contract or duty on the part of the banker may be implied to present the cheque earlier for payment, or to defer presentment of it till a later period (*f*).

(*d*) *Robarts v. Tucker*, 16 Q. B. 560. By stat. 16 & 17 Vict. c. 59, s. 19, which applies to a draft on a banker, payable to order on demand, the banker is not responsible for the genuineness of an indorsement on such draft.

(*e*) *Rickford v. Ridge*, 2 Camp. 537.

(*f*) The application of the above rule may be thus shown :—A. is the customer of a country bank, into which he pays to the credit of

his account there a cheque drawn upon a bank situate in some other town, X. If the payment by the customer is made on Friday, his bankers ought to forward the cheque on Saturday to their agent at X. for presentment to the drawees, and the agent will have discharged his duty in presenting the cheque on Monday to these last named parties. See *Hare v. Henty*, 10 C. B. N. S. 65; *Bailey v. Bodenham*, 33 L. J. C. P. 252.

3. Promissory note.

3. A promissory note, or note of hand, is a plain and direct engagement in writing, to pay a sum specified (*g*) at the time therein limited (*h*) to a person therein named, or sufficiently indicated (*i*), or to his order, or to bearer. Promissory notes are, in virtue of the statute 3 & 4 Ann. c. 9 (*h*) (made perpetual by 7 Ann. c. 25, s. 3), assignable and indorsable in like manner as bills of exchange (*l*).

What has been said of bills of exchange is in general applicable also to promissory notes, that are indorsed over, and negotiated from one hand to another; only that a promissory note is in form simpler (*m*) than a bill, inasmuch as at its inception there are but two parties to such instrument, the maker and the payee, the law considering a promissory note somewhat in the light of a bill drawn by a man upon himself, and accepted at the time of drawing. And, in case of non-payment by the maker, the several indorsees of a promissory note have the same remedy, as upon bills of exchange, against the prior indorsers.

(*g*) A promissory note under 5*l*. payable to bearer on demand is illegal. See stats. 48 Geo. 3, c. 88, s. 2; 7 Geo. 4, c. 6, s. 3; 9 Geo. 4, c. 65, s. 1; 26 & 27 Vict. c. 105.

(*h*) As in the case of a bill of exchange, *ante*, p. 185.

The days of grace (*ante*, p. 187) are allowed on a promissory note (*Brown v. Haradan*, 4 T. R. 148), even when payable by instalments (*Oridge v. Sherborne*, 11 M. & W. 374).

(*i*) *Holmes v. Jaques*, L. R. 1 Q. B. 376.

(*k*) This enactment, which extends also to foreign notes (*Milne v. Graham*, 1 B. & Cr. 192; *De la Chaumette v. Bank of England*, 2 B. & Ad. 385), was made mainly in consequence of the refusal of the

judges to recognise the practice of merchants in negotiating promissory notes in like manner as bills of exchange. (*Clarke v. Martin*, 2 Ld. Raym. 757.) As to the commencement of the recognition of inland bills by the English courts, see *Buller v. Crips*, 6 Mod. 29.

(*l*) "A promissory note is not a personal chattel in possession, but a chose in action of a peculiar nature, which has indeed been made by statute assignable and transferable according to the custom of merchants, like a bill of exchange; yet still it is a chose in action, and nothing more." *Gaters v. Madeley*, 6 M. & W. 426.

(*m*) A promissory note may, however, be joint or joint and several, and difficulties may hence occur in regard to its construction.

A promissory note, although made payable on demand, is not necessarily intended to be presented speedily, but is often rather meant to be a continuing security (*n*), and presentment of such a note, unless expressly required therein, is not needed as a condition precedent to charging the maker of the note (*o*).

4. An ordinary bank note is a promissory note, payable to bearer on demand, and passes from hand to hand by delivery, entitling the holder *pro temp.* to demand cash for his note from the bank by which it was issued, and at which it is made payable. 4. Bank note.

The title of the *bonâ fide* holder of a bank note cannot be impugned upon proof that the note had, before coming for value into his hands, been stolen from its rightful owner. A bank note passes in currency like cash (*p*), so that its previous history need not be enquired into by a transferee thereof; confidence on the part of the public is thus encouraged in that paper which represents a metallic currency. They ought merely to satisfy themselves that the thing offered by way of payment is genuine; if forged or worthless, a person taking the note will, however, in general, have a remedy as against his immediate transferor in respect of the consideration given for it (*q*); though laches on the part of the holder of a country note in presenting it for payment may, in the event of the failure of the bank which issued it, preclude him altogether from recovering (*r*).

The issue of negotiable instruments by banking co-partnerships and companies has, by reason of the exclusive privileges long since conceded to the bank of England (*s*), and on other considerations, from time to time been regu-

Issue of negotiable instruments by banks.

(*n*) *Brooks v. Mitchell*, 9 M. & W. 18.

(*o*) *Norton v. Ellam*, 2 M. & W. 461; *Sands v. Clarke*, 8 C. B. 751.

(*p*) *Miller v. Race*, 1 Burr. 452.

(*q*) *Jones v. Ryde*, 5 Taunt. 488.

(*r*) *Camidge v. Allenby*, 6 B. & C. 373.

(*s*) See, particularly, stats. 39 & 40 Geo. 3, c. 28, s. 15; 3 & 4 Will. 4, c. 98; 7 & 8 Vict. c. 32, s. 27.

lated and restricted by the legislature. And, in pursuance of the policy thus adopted, various statutes have been passed enacting generally as under:—

Banking copartnerships in England consisting of not more than six persons, may (except within the city of London or three miles therefrom), under certain regulations, issue unstamped promissory notes and bills payable at or within seven days after sight, or within seventy-one days after date (*t*).

It was formerly unlawful for banking companies of more than six persons, during the continuance of the privileges of the Bank, to borrow, owe, or take up any money on their bills or notes payable on demand, or at any time less than six months after date. This restriction was, however, relaxed by the 7 Geo. 4, c. 46, which permitted banking companies of more than six members to make and issue their bills and notes at any place beyond sixty-five miles from London (*u*), payable on demand, or otherwise, at some place or places specified therein and beyond sixty-five miles from London; such companies not having any place of business as bankers within that distance from London.

Again, the stat. 3 & 4 Will. 4, c. 83, authorized any banking company of more than six members to make their bills or notes payable in London by their agent, or to draw any bill or note upon any such agent in London, payable on demand, or otherwise, in London; but by the

(*t*) Stat. 9 Geo. 4, c. 23. This statute contains (s. 15) a saving of the privileges of the Bank of England.

By the 7 & 8 Vict. c. 32, s. 10, no new bank of issue was allowed to be created subsequent to May 6, 1844; and by s. 11, further restrictions were, from the passing of that act (July 19, 1844), placed upon bankers.

(*u*) The restriction as to distance did not extend to bills for the amount of 50*l.* or upwards, payable in London or elsewhere, at any period after date or after sight; and this limit of 50*l.* seems to have been removed by subsequent enactments. See 3 & 4 Will. 4, c. 83, s. 2; c. 98, s. 2; 7 & 8 Vict. c. 32, s. 26.

3 & 4 Will. 4, c. 98, s. 2, no such company can, during the continuance of the privileges of the Bank of England, make or issue in London, or within sixty-five miles thereof, any bill, or note, or engagement for the payment of money on demand, or upon which any person holding the same may obtain payment on demand; though it is lawful for any corporation or partnership transacting banking business at a greater distance than sixty-five miles from London, and not having any house of business or establishment as bankers in London, or within sixty-five miles thereof, to make and issue their bills and notes, payable on demand, or otherwise, at the place of issue, being more than sixty-five miles from London, and also in London, and to have an agent or agents in London, or at any other place at which such bills or notes shall be made payable, for the purpose of payment only. But no such bill or note shall be for any sum less than 5*l.*, or be re-issued in London, or within sixty-five miles thereof.

The authority contained in the stat. 3 & 4 Will. 4, c. 83, extends only to companies of more than six members carrying on business beyond sixty-five miles from London. It was indeed at one time supposed that the statute referred to prohibited companies of more than six members from carrying on any banking business within the above-mentioned limits; but the doubts on this head were removed by the 3rd section of the stat. 3 & 4 Will. 4, c. 98, enacting that any company of more than six persons may carry on the business of banking in London, or within sixty-five miles thereof, provided such company do not borrow, owe, or take up in England any money on their bills or notes payable on demand, or at less than six months from the borrowing thereof.

It has since been made lawful for any banking company, though exceeding six in number, carrying on business in London or within sixty-five miles thereof, to draw, accept, or indorse, bills of exchange not being

payable to bearer on demand, notwithstanding any previous statute to the contrary (x).

Lastly, nothing contained in the recent statute 27 & 28 Vict. c. 32 (y), empowers any copartnership to carry on the trade of bankers in London or within sixty-five miles thereof who were not authorized to do so under the pre-existing law.

It remains but to add upon this part of our subject, that the courts have always shown a disposition to protect the privileges of the Bank of England, and to discountenance any attempts at evading the restrictions which have for the benefit of that establishment been placed upon other banking companies (z).

5 Certain contracts of loan and insurance.

5. Before considering certain contracts of loan and insurance which seem properly to fall under our present head, a few introductory remarks may be needful respecting a simple loan of money, to the efficacy of which writing, of course, although often used to evidence it, is not essential.

Introductory remarks.

Borrowing is a contract by which a qualified property in money may be transferred to the borrower; either gratuitously or for a price, a stipend, or additional recompense for its enjoyment. It is a contract whereby the possession of and a transient property in money is transferred for a time or particular purpose, on condition that the money borrowed be restored so soon as the time is expired or purpose has been accomplished; together with the price or stipend either expressly agreed on by the parties, or left to be implied by law. By this mutual contract, the borrower gains a temporary property in the money borrowed, accompanied with an express or implied condition to restore it, and the owner or lender retains a

(x) 7 & 8 Vict. c. 32, s. 26.

(y) Intituled, "An Act to enable certain banking copartnerships which shall discontinue the issue of their own bank notes to sue and be

sued by their public officer."

(z) *Bank of England v. Anderson*, 3 Bing. N. C. 589; 2 Keen, 328; *Booth v. Bank of England*, 7 Cl. & F. 509.

reversionary interest in the same, and acquires a new property in the price or reward.

There is one species of this price or reward, the most usual of any, concerning which good and learned men in former times perplexed themselves, by raising doubts about its legality *in foro conscientie*. That is, when money is lent on a contract to receive not only the principal sum again, but also an increase by way of compensation for its use; which generally is called interest by those who think it lawful, or, when excessive, usury. The enemies to interest in general have indeed made no distinction between that and usury, holding any increase of money to be indefensible. And this opinion they partly grounded on the prohibition of it by the law of Moses among the Jews, and condemned the practice of taking interest, as being contrary to the divine law, both natural and revealed. The canon law (*a*), moreover, proscribed the taking any, the least, increase for the loan of money as a mortal sin.

But, in answer to this, it has been observed, that the Mosaical precept was clearly a political, not a moral ordinance. It only prohibited the Jews from taking usury from their brethren the Jews; but in express words permitted them to take it of a stranger (*b*); which shows that the taking of moderate usury, or a reward for the use, for so the word signifies, is not *malum in se*; since it was allowed where any but an Israelite was concerned.

Moreover, although, as noticed at a former page (*c*), money was originally used only for the purposes of exchange, yet the laws of any state may be well justified in permitting it to be turned to the purposes of profit, if the convenience of society (the great end for which money was invented) require it. And that the allowance of interest tends greatly to the benefit of the public, especially in a trading country, appears from the generally

(*a*) Decretal. l. 5, tit. 19.

(*c*) *Ante*, p. 160.

(*b*) Deut. xxiii. 20.

acknowledged principle, that commerce cannot subsist without mutual and extensive credit. Unless money therefore can be borrowed, trade cannot be carried on : and if no premium were allowed for the hire of money, few persons would care to lend it ; or at least the ease of borrowing at a short warning (which is the life of commerce) would be entirely at an end. Thus, in the dark ages of monkish superstition and civil tyranny, when interest was laid under a total interdict, commerce was also at its lowest ebb, and fell entirely into the hands of the Jews and Lombards : but when men's minds began to be more enlarged, when true religion and real liberty revived, commerce grew again into credit ; and introduced with itself its inseparable companion, the doctrine of loans upon interest. And, as to any scruples of conscience, since all other conveniences of life may either be bought or hired, but money can only be hired, there seems to be no greater oppression in taking a recompense or price for the hire of this, than of any other convenience. To demand an exorbitant price is equally contrary to conscience, for the loan of a horse, or the loan of a sum of money : but a reasonable equivalent for the temporary inconvenience, which the owner may feel by the want of it, and for the hazard of his losing it entirely, is not more immoral in one case than it is in the other. Indeed the absolute prohibition of lending upon any, even moderate interest, would introduce the very inconvenience which it might seem meant to remedy. The necessity of individuals will make borrowing unavoidable. Unless profit for the loan of money were allowed by law, there would be but few lenders ; and those principally bad men, who would break through the law, and take a profit ; and then would endeavour to indemnify themselves from the danger of the penalty, by making that profit exorbitant.

Therefore, as well in other countries as in our own, where laws against usury have existed, a capital distinction has been made between a moderate and an exorbitant

profit for the use of money. The Romans at one time allowed *centesimæ*, one *per cent.* monthly, or twelve *per cent. per annum*, to be taken for common loans; and Justinian (*d*) reduced it to four *per cent.*; but allowed higher interest to be taken of merchants, because there the hazard was greater. Grotius informs us (*e*), that, in Holland, the rate of interest was eight *per cent.* on common loans, but twelve to merchants. And Lord Bacon was desirous of introducing a similar policy in England (*f*): but our law established one standard for all alike, where the pledge or security itself was not put in jeopardy. With us the rate of legal interest, during the existence of usury laws, varied and decreased according as the quantity of specie in the kingdom increased by accessions of trade, the introduction of paper credit, and other circumstances (*g*). Until, in the year 1854, all the then existing laws against usury were, by the 17 & 18 Vict. c. 90, entirely repealed (*h*).

The exorbitance or moderation of interest for money lent depends, in truth, upon two circumstances: the inconvenience of parting with it for the present, and the hazard of losing it entirely. The inconvenience to individual lenders can never be estimated by laws; the current rate, therefore, of interest must depend upon the usual or general inconvenience. This results entirely from the quantity of specie or current money in the kingdom: for, the more specie there is circulating in any nation, the greater superfluity there will be, beyond what is necessary to carry

(*d*) Cod. 4. 32. 26. Nov. 33, 34, 35.

(*e*) De Jur. Bell. et Pa. 2. 12. 22.

(*f*) Essays, c. 41.

(*g*) Thus the statute 37 Hen. 8, c. 9, confined interest to 10 *per cent.*, and so did the statute 13 Eliz. c. 8. But as, through the encouragements given in her reign

to commerce, the nation grew more wealthy, so, under her successor, the statute 21 Jac. 1, c. 17, reduced it to eight *per cent.*; as did the statute 12 Car. 2, c. 13, to six; and the statute 12 Ann. st. 2, c. 16, to five *per cent.* yearly.

(*h*) Sect. 1. The above statute does not affect the law as to pawn-brokers, s. 4.

on the business of exchange and the common concerns of life. In every nation or public community, there is a certain quantity of money thus necessary; which a person well skilled in political arithmetic might calculate almost as exactly, as a private banker could estimate the demand for running cash in his own till: all above this necessary quantity may be spared, or lent, without much inconvenience to the respective lenders; and the greater this national superfluity is, the more numerous will be the lenders, and the lower will the current rate of interest ordinarily be: but, where there is not enough circulating cash, or barely enough, to answer the daily uses of the public, interest will be proportionably high; for lenders will be but few, as few can submit to the inconvenience of lending.

So also the hazard of loss has its weight in the regulation of interest: the better the security, the lower will the interest be; the rate of interest being generally in a compound ratio, formed out of the inconvenience, and the hazard. And as, if there were no inconvenience, there should be no interest but what is equivalent to the hazard, so, if there were no hazard, there ought to be no interest, save only what arises from the mere inconvenience of lending. Thus, if the quantity of specie in a nation be such, that the general inconvenience of lending for a year is computed to amount to three *per cent.*: a man having money by him will perhaps lend it upon good personal security at five *per cent.*, allowing two for the hazard run; he will lend it upon landed security or mortgage at four *per cent.*, the hazard being proportionably less; but he will lend it to the state, on the maintenance of which all his property depends, at three *per cent.*, the hazard being none at all. But formerly the hazard might sometimes have been greater than the rate of interest allowed under a restrictive law would compensate. And this gave rise to various species of contracts by way of insurance or otherwise, which will here be briefly adverted to.

Bottomry (which originated from permitting the master of a ship, in a foreign country, to hypothecate the ship in order to raise money to refit (*i*)) is in the nature of a mortgage of a ship; when the master takes up money to enable him to carry on his voyage, and pledges the keel or bottom of the ship (*partem pro toto*) as a security for its re-payment. In which case, it is understood, that, if the ship be lost, the lender loses also his whole money; but, if it returns in safety, then he shall receive back his principal, and also the premium or interest agreed upon. And this is allowed to be a valid contract in all trading nations, for the benefit of commerce, and by reason of the extraordinary hazard run by the lender (*k*). In this case the ship and tackle, if brought home, are answerable (as well as the person of the borrower) for the money lent, and nothing short of an actual total loss will discharge the borrower (*l*).

If the loan is not upon the vessel, but upon the goods and merchandize, which must necessarily be sold or exchanged in the course of the voyage, then only the borrower, personally, is bound to answer the contract; who therefore in this case is said to take up money at *respondentia* (*m*). The general nature, accordingly, of a *respondentia* bond is this: the borrower binds himself in a penal sum, upon condition that the obligation shall be

(i) The circumstances under which the master is authorised to raise money on the credit of the owner or on bottomry, are set forth in *The Karnak*, L. R. 2 Adm. 289; *The Great Eastern*, *id.* 88; *The Gratitude*, 3 Rob. 240; *Benson v. Chapman*, 2 H. L. Cas. 696. See also 19 & 20 Vict. c. 97, s. 8.

(k) Instruments of bottomry are in use in all countries wherein maritime commerce is carried on. The lender of the money is entitled to receive a recompense, called, in the

civil law, "*periculi pretium*," to which no person can be entitled who does not take upon himself the peril of the voyage. *Simonds v. Hodgson*, 3 B. & Ad. 57.

See also Moll. de Jur. Mar. 361; Malyne, Lex Mercat. b. 1, c. 31; Bacon's Essays, c. 41; Cro. Jac. 208; Bynkersh. Quæst. Jur. Privat. l. 3, c. 16.

(l) *Thomson v. Royal Exch. Ass. Co.*, 1 M. & S. 30.

(m) *Busk v. Fearon*, 4 East, 319.

void, if he pay the lender the sum borrowed and so much per month from the date of the bond till the ship arrives at a certain port, or if the ship be lost or captured in the course of the voyage. The *respondentia* interest is frequently at a high rate in proportion to the risk and profit of the voyage. Further, a lender upon *respondentia* is entitled to receive the whole sum advanced, provided the ship and cargo arrive at the port of destination; nor will he lose the benefit of the bond, if an accident happens by the default of the borrower or the captain of the ship. Neither will a temporary capture, or any damage short of the destruction of the ship, defeat his claim (n).

The terms "bottomry" and "*respondentia*," above used, are also applied to contracts for the repayment of money borrowed, not on the ship and goods only, but on the mere hazard of the voyage itself; *ex. gr.*, when a man lends a merchant 1000*l.* to be employed in a beneficial trade, with condition to be repaid with extraordinary interest, in case such voyage be safely performed: which kind of agreement is sometimes called *ſœnus nauticum*, and sometimes *usura maritima* (o).

Insurance
generally.

A policy of insurance (p) is a contract between A. and B., that upon A.'s paying a premium equivalent to the hazard run, B. will indemnify or insure him against a particular event (q). This is founded upon one of the same principles as the doctrine of interest upon loans, that of hazard; but not that of inconvenience. For, if I insure a ship to the Levant, and back again, at five *per cent.*; here I calculate the chance that she performs her voyage, to be twenty to one against her being lost: and, if she be lost, I lose 100*l.* and get 5*l.* Now, this is much the same

(n) See *Thomson v. Royal Exch. Ass. Co.*, 1 M. & S. 30.

(o) Moll. de Jur. Mar. 361. Malynes, Lex Mercat. b.1, c. 31.

(p) *Police d'assurance*, from *polliceri*, to promise. So, a bill of

lading is called in French *police de chargement*.

(q) The subject matter insured was peculiar in *Carter v. Boehm*, 5 Burr. 1905; *Wilson v. Jones*, L. R. 2 Ex. 139.

as if I lend the merchant, whose fortunes are embarked in this vessel, 100*l.* at the rate of eight *per cent.* For, by a loan I should be immediately out of possession of my money, the inconvenience of which we have supposed equal to three *per cent.* : if, therefore, I had actually lent him 100*l.* I must have added 3*l.* on the score of inconvenience, to the 5*l.* allowed for the hazard, which together would have made 8*l.* But as, upon an insurance, I am never out of possession of my money till the loss actually happens, nothing is therein allowed upon the principle of inconvenience, but all upon the principle of hazard.

To the time of queen Elizabeth is referable the first of our statutes (*r*) concerning marine insurance, its object having been to establish a special tribunal for the determination of cases connected therewith; or rather to confirm and extend the authority of one which the merchants of London had previously established. The special court thus erected for deciding questions on policies of insurance fell, however, on account of its defective jurisdiction, into disuse; it having been decided, that a judgment therein for the defendant did not protect him from a subsequent action for the same cause (*s*).

It must not, indeed, be supposed that maritime insurance originated with the statute of Elizabeth just cited, or was, even at the date of its passing, of recent existence here; on the contrary, the preamble of the act recites that it had been "time out of mind an usage amongst merchants, both of this realm, and of foreign nations;" the introduction of maritime insurance amongst us having been due

(*r*) 43 Eliz. c. 12.

(*s*) *Came v. Moye*, 2 Sid. 121. A subsequent parliamentary interference with this matter, was the granting of a monopoly of insuring, as against other companies, to the Royal Exchange and the London Assurance Companies, by the stat. 6 Geo. 1, c. 18, which was repealed

by the 5 Geo. 4, c. 114; and marine assurances are now largely effected with public companies.

As to the mode in which assurances are transacted, through the medium of brokers, see *Stewart v. Aberdeen*, 4 M. & W. 211; *Jenkins v. Power*, 6 M. & S. 289; *Xenos v. Wickham*, L. R. 2 H. L. Cas. 296.

to the Lombards, who settled in London in the 13th century, and for a long time conducted, almost exclusively, the foreign trade of this country (*t*).

The written contract (*u*) by which a ship, its cargo, or freight (*v*) may be insured, is called a policy of insurance (*x*)—an open policy, where the value of the thing insured is not inserted in it, but in case of loss is to be proved—a valued policy where the value is settled by agreement between the parties (*y*), viz., the assured and the underwriters; though, even in this case, if the loss be partial, the amount must be proved; and if the goods insured are fraudulently overvalued, to cheat the insurers, the contract is thereby entirely vitiated, and nothing can be recovered upon it (*z*).

The policy must contain the name or names of one or more of the persons interested, or of the consignor or consignee of the property, or of the person or persons residing in Great Britain, who shall receive the order for and effect the insurance, or of the person or persons who shall give the order to the agent employed to effect the same (*a*). It has, however, recently been enacted (*b*), that wherever a policy on any ship, goods, or freight has been assigned (*c*), so as to pass the beneficial interest therein to any person entitled to the property thereby

(*t*) Mr. Duer observes, in the Introduction to his Treatise on Marine Insurance, p. 33, that the influence of the Italians over the commerce and commercial regulations of our ancestors is well known, and is attested, even at this day, by the reference in sea policies to the street which was distinguished by the name and residence of their countrymen.

(*u*) The contract of marine insurance is expressly required to be in writing by stat. 35 Geo. 3, c. 63, s. 11.

(*v*) See *De Vaux v. L'Anson*, 7

Scott, 507.

(*x*) See its ordinary form, Arnould, Mar. Insur. 3rd ed. 220. As to the stamp on the policy, see Smith, Merc. Law, 7th ed. 367.

(*y*) Smith, Merc. Law, 7th ed., 344; *Irving v. Manning*, 1 H. L. Cas. 287; *Barker v. Janson*, L. R. 3 C. P. 303; *Wilson v. Nelson*, 5 B. & S. 354.

(*z*) *Haigh v. De la Cour*, 3 Camp. 319.

(*a*) Stat. 28 Geo. 3, c. 56, s. 1.

(*b*) 31 & 32 Vict. c. 86, s. 1.

(*c*) As by indorsement of the policy. *Id.* s. 2.

insured, the assignee of such policy shall be entitled to sue thereon in his own name; the defendant in such action being entitled to make any defence which he might have made if it had been brought in the name of the person by whom or for whose account the policy sued upon was effected.

The wording of a sea policy of insurance is peculiar; but the mercantile world have long been used to it, and every material portion of it has been diligently scanned by lawyers, and been illustrated by the decisions of our courts. It is to be construed according to the same rules as other written contracts, and by reference to the intention of the parties, which must be gathered from the words of the instrument and the surrounding circumstances. If the words of the instrument are clear in themselves, the instrument must be construed accordingly; but if its words are susceptible of more meanings than one, the judge must inform himself of their true significance by the aid of the jury and the surrounding circumstances which bear upon the contract (*d*).

The person underwriting a sea policy is guided in so doing by these considerations. He calculates and estimates, as best he may, the price at which he may safely indemnify the trader, proposing to insure, against risks, regard being had to the nature of the voyage to be performed, and the usual course and manner of making it. He takes the risk upon the supposition that whatever is usual or necessary will be done. And if the risk is varied, or the voyage is altered, by the fault of the owner or master of the ship, the insurer ceases to be liable.

Marine insurance is thus essentially a contract of indemnity against the perils of the voyage enumerated in the policy (*e*); the dangers usually insured against, being "of the seas, men of war, fire, enemies, pirates, rovers, thieves,

(*d*) *Carr v. Mont-fiore*, 5 B. & S. 408, 428.

(*e*) Which must set forth the premium, the amount insured, the risks

insured against, and the names of the underwriters. 35 Geo. 3, c. 63, s. 11. See, also, 54 Geo. 3, c. 144.

jettisons (*f*), letters of mart and countermart, surprisals, takings at sea, arrests, restraints, and detainerments of all kings, princes, and people of what nation, condition, or quality soever, barratry (*g*) of the master and mariners, and all other perils (*h*), losses, and misfortunes."

Now, supposing a loss, whether of ship, cargo, or freight, to have occurred, it may, regard being had to the above words, sometimes be matter of contention whether the loss resulted from a peril insured against, or whether in respect of it the underwriters are exempt from liability (*i*). And although difficulty may be felt in satisfactorily discriminating between particular cases and peculiar states of facts, and although it be impossible to draw any precise line upon this subject, the general rule is, that where mischief arises from perils of the seas, and the natural and almost inevitable consequence of that mischief is to create further mischievous results, the underwriters will be responsible for the further mischief and damage so occasioned. The relation of cause and effect cannot, indeed, always be accurately ascertained; yet if, in the ordinary course of events, a certain result usually follows from a given cause, the immediate relation of one of these to the other may, for practical purposes, be held to be established, and the *causa causans* may thus be singled out (*k*).

(*f*) "Jettison" is a voluntary throwing overboard of goods in case of distress, or to save them from capture. *Butler v. Wildman*, 3 B. & Ald. 398.

(*g*) Generally speaking, "barratry" comprehends every species of fraud, knavery, or criminal conduct in the master, by which the owners or freighters are injured.

The meaning of this word was much discussed in *Grill v. General Iron Screw Co.*, L. R. 3 C. P. 476; 1 C. P. 600.

(*h*) As to what perils are com-

prised in the general words "other perils," see *Phillips v. Barber*, 5 B. & Ald. 161; *Cullen v. Butler*, 5 M. & S. 461; *Taylor v. Dunbar*, L. R. 4 C. P. 206.

(*i*) See, for instance, *Montoya v. London Ass. Co.*, 6 Exch. 451, where a vessel laden with hides and tobacco, in the course of her voyage, shipped seawater, which damaged the hides and affected the flavour of the tobacco. This damage was held to have been caused by perils of the seas.

(*k*) See, *ex. gr.*, *Ionides v. Univ. Mar. Ins. Co.*, 14 C. B. N.S. 259.

Again, by the terms of the policy, the underwriters are usually made liable for salvage and for general average.

The term "salvage" is used to signify either what may be recovered from a wreck, or, as here, the compensation allowed to those persons by whose assistance a ship or cargo is saved from danger or loss in case of wreck, capture, or the like (*l*).

General average (originally the proportion of cattle-labour due from each tenant to his lord, from *averare*, to carry or draw, and afterwards used to signify the proportion paid by each merchant for his goods carried (*m*)), is a contribution by the owners of the ship, freight, and goods on board, in proportion to their respective interests, towards any particular loss or expense sustained for the general safety of the ship and cargo, in order that the particular sufferer may not in the end be a greater loser than the rest of the persons interested. Thus, in the case of jettison (*n*), or of cutting away the ship's masts in a storm, or where salvage is paid to recaptors, or goods are given as a compensation to pirates to save the rest, or an expense is incurred in reclaiming the ship, or defending a suit in a foreign court of admiralty, and obtaining her discharge from an unjust capture or detention:—in these and the like cases, where any sacrifice is deliberately and voluntarily made, or any expense is fairly and *bonâ fide* incurred to prevent a total loss, or some great disaster, such sacrifice or expense is regarded as the proper subject of a general contribution, and is to be rateably borne by the owners of the ship, freight, and cargo, so that the loss may fall equally upon all, according to the maxim of the civil law, *nemo debet locupletari alienâ jacturâ*. The application of this principle was understood by the Rhodians, whose regulations on the subject were adopted into the

(*l*) Maud. & Poll. Merch. Shipp., 2nd ed. 419. The claim to and mode of estimating salvage are now mainly regulated by stat. 17 & 18 Vict. c.

104, ss. 458, *et seq.*

(*m*) Cowell, Law Dict. *ad verb.*

(*n*) See *Miller v. Tetherington*, 6 H. & N. 278.

Roman law, and made an important head in the Digest (*o*). The claim to general average does not arise, unless the loss was voluntarily incurred by those on board, or having the conduct of the business, and tended to, and was actually followed by, the preservation of the rest, or of some part of the ship and cargo (*p*).

Petty or accustomed averages are such small charges as pilotage, towage, light money, beaconage, anchorage, quarantine, &c., which, when they are incurred in the ordinary course of the voyage, are regarded as necessary and ordinary expenses, and not as a loss within the terms of the policy; but if incurred for any extraordinary purpose in the voyage, as to provide against an impending danger, or in consequence of the ship's being driven out of her course by stress of weather, are deemed general average, for which the insurer will be liable (*q*).

Such being in brief the liabilities cast upon the underwriter of a marine policy in the ordinary form, he engages within such limits, and to the extent of its real or agreed value, that the ship or cargo insured shall arrive safely at its destination, and undertakes, on the happening of a certain contingency, to make good the loss. Such loss may be partial or total, there being three classes of cases in which total loss may occur: the first is where the ship absolutely sinks, and is, in fact, lost; the second, where the ship itself may not be, in fact, totally lost, but may be unable to continue her voyage, being injured past repair; and the third, where the ship can be repaired, but the expense of repair will be so considerable, that after the repairs have been effected the vessel will fetch less in the

(*o*) Under the title *De lege Rhodi de jactu*.

(*p*) Marshall, Insur. 539.

As to the mode of estimating the amount of contribution in respect of general salvage, and liability for it, see *Fletcher v. Alexander*, L. R. 3 C. P. 375; *Dickenson v. Jardine*,

Id. 639.

(*q*) As to "particular average," and "particular charges," see *Kidston v. Empire Mar. Ins. Co.*, L. R. 2 C. P. 357; *Booth v. Gair*, 15 C. B. N. S. 291; *Oppenheim v. Fry*, 5 B. & S. 348.

market than the sum expended in repairing her; a case falling within this last class is one of what is termed constructive total loss, and there notice of abandonment should be given by the insured (*r*). Where, moreover, the subject-matter of the insurance is not actually annihilated, the assured claiming as for a total loss must give up to the underwriters all the remains of the property recovered, together with all benefit and advantage belonging or incident to it (*s*).

A policy of marine insurance may contain express, or may give rise to implied warranties, non-fulfilment of which by the assured will discharge the underwriter from liability; a warranty differing from a representation *dehors* the policy in this respect, that it must be strictly complied with. A warranty is a condition or contingency; unless it be performed there is no contract. Nor does it signify for what purpose the warranty was introduced, for being introduced the contract does not exist unless it is literally complied with (*t*). A collateral representation, if false in a material point, may indeed avoid the policy; if in a point immaterial, it can rarely suffice to evidence fraud, and will not in the absence of fraud vitiate the policy (*u*).

As showing the nature of an implied warranty, the following instance must suffice: a voyage policy may be effected on a ship prior to her leaving port, or when actually at sea, and in it there is contained an implied warranty that the ship is seaworthy at the commencement of the voyage; or in port, when preparing for it, or that

(*r*) *Arg. Irving v. Manning*, 1 H. L. Cas. 290; *Fleming v. Smith*, *Id.* 513; *Stewart v. Greenock Mar. Ins. Co.*, 2 H. L. Cas. 159, 183; *King v. England*, 3 H. & C. 209.

(*s*) *Stewart v. Greenock Mar. Ins. Co.*, *supra*.

See as to a constructive total loss of the ship, *Kemp v. Halliday*, 6 B. & S. 723; *King v. Walker*, 3 H. &

C. 209; *Grainger v. Martin*, 4 B. & S. 9;—of goods, *Farnworth v. Hyde*, L. R. 2 C. P. 204;—of freight, *Kidston v. Empire Mar. Ins. Co.*, L. R. 2 C. P. 357.

(*t*) *Carter v. Boehm*, 3 Burr. 1905.

(*u*) *M'Dowell v. Fraser*, Dougl. 247; *De Hahn v. Hartley*, 1 T. R. 343.

she had been seaworthy for the voyage when it commenced, if the insurance were on a vessel then at sea, that is to say, there is in such case a warranty of seaworthiness at the commencement of the risk (*x*). The ground on which the implication of a warranty of seaworthiness rests is this. The insurer is entitled to expect that the shipowner will do all that it behoves a careful and conscientious man to do to secure the safety of the crew who are to navigate the vessel, and of the merchant's goods which are to be conveyed in it, so that the risk covered by the insurance shall be limited to those perils incidental to navigation, against which the care and skill of man cannot provide. This doctrine is, however, flexible, and capable of accommodating itself to particular states of facts, so that if an insurer, with full knowledge of facts, agrees to insure a vessel incapable from her size or construction of being brought up to the ordinary standard of seaworthiness, the implied warranty will be taken to be limited to the capacity of the vessel, and will be satisfied if she is made as seaworthy as she is capable of being made (*y*).

A policy of insurance, as we have seen (*z*), is a contract of indemnity, subject to this qualification, that the parties may agree beforehand in estimating the value of the subject assured, by way of liquidated damages (*a*). Such an insurance is essentially a speculative contract. The special facts upon which the contingent chances are to be computed lie most commonly within the knowledge of the assured only; the underwriter trusts to his representation, and proceeds in confidence that the assured does not keep back any circumstance within his knowledge to mislead the underwriter into a belief that the circumstance does

(*x*) By the law of England, in a time policy effected on a ship then at sea, there is no implied condition that the ship should be seaworthy on the day when the policy is intended to attach. *Gibson v.*

Small, 4 H. L. Cas. 353.

(*y*) *Burges v. Wickham*, 3 B. & S. 669.

(*z*) *Ante*, pp. 212, 213.

(*a*) *Irving v. Manning*, 1 H. L. Cas. 307.

not exist, and to induce him to estimate the risk as if it did not exist. The keeping back such circumstance is a fraud, which vitiates the policy. Nay, even though the suppression should happen through mistake, without any fraudulent intention, still the underwriter is deceived, and the policy may be avoided, the reason being that the risk in such case run is really different from the risk understood and intended to be run at the time of the agreement. And the policy would equally be void as against the underwriter if he concealed, as if he insured a ship on her voyage which he privately knew to have arrived, in which case an action would lie against him to recover back the premium (*b*).

No proposition, it has been judicially remarked, is better established than this, viz., that the party proposing the insurance is bound to communicate to the insurer all matters which will enable him to determine the extent of the risk against which he is to guarantee the assured; if, indeed, matters are common to the knowledge of both parties, such matters need not be communicated; and when a fact is one of public notoriety, as of war, or where it is one which is matter of inference, and the materials for informing the judgment of the underwriter are common to both, the party proposing the insurance is not bound to communicate that which he is fully warranted in assuming the underwriter already knows. Short of this, however, the party proposing the insurance is bound to make known to the insurer whatever is necessary and essential to enable him to determine what is the extent of the risk against which he undertakes to insure. Though, if the insurer choose to neglect the information which he receives, it is his own fault, provided sufficient information, so far as the assured is concerned, has been placed at his disposal (*c*).

(*b*) *Carter v. Boehm*, 3 Burr. & S. 14.
 1905; *Russell v. Thornton*, 6 H. & (c) *Bates v. Hewitt*, L. R. 2 Q.
 N. 140; *Holland v. Russell*, 4 B. B. 595, 604-5.

The inducements to fraud on the part of the assured were to some extent diminished by the stat. 19 Geo. 2, c. 37, before the passing of which a practice had obtained of insuring large sums without having any property on board, which were called insurances, "interest or no interest;" this was a species of gaming, without any advantage to commerce, such policies being denominated wagering policies: it was therefore enacted by sec. 1 of the above statute that all insurances, interest or no interest, or without further proof of interest than the policy itself, or by way of gaming or wagering, or without benefit of salvage to the insurer, shall (with certain exceptions) be totally null and void; but this provision does not extend to foreign ships. Reinsurances which were prohibited by a repealed (*d*) section of the above statute are now legal (*e*).

Fire insurance.

A policy of insurance against loss by fire is a contract of indemnity within the statute 14 Geo. 3, c. 48 (*f*), by which the company insuring undertakes to make good the loss by a money payment not exceeding the amount insured, or (in general) to reinstate the premises which have sustained damage. Upon the construction of this instrument, the form of which varies, difficult questions may arise (*g*); the principles which govern it, however, are very simple: any material misdescription of the premises insured, or fraud on the part of the assured, avoids the policy, any condition contained therein, performance of which by the assured is precedent to his right to claim under the policy, must be performed (*h*), and damage proximate to the peril insured against is alone recoverable (*i*).

(*d*) See 30 & 31 Vict. c. 59.

(*e*) 27 & 28 Vict. c. 56, s. 1.

(*f*) *Post*, p. 221.

(*g*) See, for instance, *Elliott v. Royal Exch. Ass. Co.*, L. R. 2 Ex. 237.

(*h*) *Mason v. Harvey*, 8 Exch.

819.

(*i*) *Marsden v. City and County Ass. Co.*, L. R. 1 C. P. 232; *Everett v. London Assur. Co.*, 19 C. B. N. S. 126; *Stanley v. Western Insur. Co.*, L. R. 3 Ex. 71.

Life insurance is made available for effecting any of various useful objects, such as making a settlement upon marriage or afterwards insuring a provision for wife and children. So, too, in the case of a loan, if the chance of re-payment depends upon the borrower's life, it is usual (besides the ordinary rate of interest) for the borrower to have his life insured till the time of re-payment; for which he is loaded with an additional premium, suited to his age and constitution. Thus, if Sempronius has only an annuity for his life, and would borrow 100*l.* of Titius for a year; the inconvenience and general hazard of this loan, we have seen (*k*), are equivalent to 5*l.*, which might, therefore, be the rate of interest: but there is also a special hazard in this case; for if Sempronius dies within the year, Titius may lose the whole of his 100*l.* Suppose this chance to be as one to ten: it will follow that the extraordinary hazard is worth 10*l.* more, and therefore that the reasonable rate of interest in this case would be fifteen *per cent.* Sempronius, therefore, gives Titius, the lender, 5*l.* by way of interest, and applies to an insurance company to indemnify Titius against the extraordinary hazard incurred, paying them the other 10*l.* *per annum* for so doing. And in this manner may any particular hazard be provided against. But, in order to prevent these insurances from being turned into a mischievous kind of gaming, it was enacted by the statute 14 Geo. 3, c. 48 (*l*), that no insurance shall be made on any life wherein the party insured has no interest; that in all policies the name of such interested party shall be inserted; and that nothing more shall be recovered thereon than the amount of the interest of the insured (*m*).

(*k*) *Ante*, p. 208.

(*l*) *Ss.* 1—3.

(*m*) Every individual has an insurable interest in his own life. It has, however, been held that a father has not an insurable interest

in the life of his child (*Halford v. Kymmer*, 10 B. & Cr. 72); though it seems that a wife has such an interest in the life of her husband (*Reed v. Royal Exch. Ass. Co.*, Peake, Add. C. 70).

As well policies of insurance against fire as those against sea risks are properly contracts of indemnity, the insurer engaging to make good within certain limited amounts losses sustained by the assured in their buildings, ships, and goods. The contract of life assurance differs however from the two preceding contracts in this respect, that it is a mere contract to pay a sum of money on the death of a person in consideration of a certain sum paid down, or of the due payment of a certain annuity for his life, the amount of the annuity being calculated in the first instance according to the probable duration of the life, and when once fixed being constant and invariable. This species of insurance, although formerly regarded as a contract of indemnity (*o*), is not really such (*p*).

It has recently been enacted that any person or corporation entitled by assignment or other derivative title to a policy of life assurance, and possessing at the time of action brought the right in equity to receive and the right to give an effectual discharge to the assurance company liable on such policy, may sue for the moneys secured by

(*o*) *Godsall v. Boldero*, 9 East, 72. There, an insurance for a certain term had been effected on the life of Mr. Pitt by a tradesman to whom he was indebted. Mr. Pitt died insolvent before the term of insurance had expired. A grant of money was made by parliament to defray his debts, and out of this grant the plaintiff's claim was liquidated. It was held that the insured could not recover upon the policy. "This action," said Lord Ellenborough, "is, in point of law, founded upon a supposed damnification of the plaintiff occasioned by the death of the assured existing and continuing to exist at the time of action brought; and being so founded, it follows, of course, that if be-

fore the action was brought, the damage which was at first supposed likely to result to the creditor from the death were wholly obviated and prevented by payment of the debt, the foundation of any action on the part of the assured against the insurer fails."

(*p*) *Dalby v. India and London Life Ass. Co.*, 15 C. B. 365. There the action was brought upon a policy of assurance effected on the life of the late Duke of Cambridge. The interest of the assured in the policy had ceased before the death of the duke, so that there was nothing in respect of which he could claim to be indemnified; the action nevertheless was held to be maintainable.

it (*q*), a written notice of the assignment having been duly given (*r*).

The extent of security afforded by a life policy varies in accordance with the form adopted by the office which insures and the exceptions inserted in it (*s*). Such a policy being founded upon the answers given by the assured to questions concerning his health proposed to him, will be avoided by any misrepresentation on his part, or by the wilful suppression of a material fact. The distinction formerly adverted to being here again noticeable between a warranty which, whether material or immaterial, must be adhered to, and a representation which, unless material and fraudulent, cannot *per se* affect the right of the assured to recover upon the policy (*t*). As a general rule, however, with the statement of which this division of our subject will conclude, "In all cases of insurance, whether on ships, houses, or lives, the underwriter should be informed of every material circumstance within the knowledge of the assured" (*u*).

III. Contracts not falling within either of the two preceding classes are in the next place to be considered ; such, I mean, as are not required to be in writing by statute, nor are so in virtue of custom and usage prevalent amongst merchants. Contracts referable to this class are of course infinitely various, but a few of them only can properly here be noticed. We shall speak of the contract of bailment generally, contracts with carriers of goods and passengers, and shall incidentally mention some other

III. Contracts not required to be in writing.

(*q*) 30 & 31 Vict. c. 144, s. 1. This act does not apply to assurances, &c., granted under the 16 & 17 Vict. c. 45, or 27 & 28 Vict. c. 43 ; or to any engagement for payment on death by a friendly society.

(*r*) 30 & 31 Vict. c. 144, s. 3.

(*s*) As to the exception in case of suicide, see *Borradale v. Hunter*, 5 M. & Gr. 639 ; *Clift v. Schwabe*,

3 C. B. 437 ; in case of accident, see *Fitton v. Accidental Death Ins. Co.*, 17 C. B. N. S. 122.

(*t*) *Anderson v. Fitzgerald*, 4 H. L. Cas. 484, 503—4 ; *Broom*, Leg. Max. 4th ed. 757—8, and cases there cited.

(*u*) *Lindenau v. Desborough*, 8 B. & C. 586, 592.

kinds of contracts and agreements about which specific knowledge should be had.

1. *Bailment.* 1. Bailment, from the French word *bailier*, to deliver, is a delivery of a thing in trust for some special object or purpose, and upon an undertaking express or implied to conform to the object or purpose of the trust; as if cloth be delivered, or (in our legal dialect) bailed, to a tailor to make a suit of clothes, he has it upon an implied contract to render it again when made, and that in a workmanlike manner. If goods be delivered to a common carrier, to convey from Oxford to London, he is under a contract in law to carry them to the person appointed. If goods be delivered by a guest to an inn-keeper, the inn-keeper is bound to keep them safely, and restore them when his guest leaves the house. If a man takes in cattle to graze and depasture on his land, which the law calls agistment, he takes them upon an implied contract to return them on demand to the owner. If a pawnbroker receives plate or jewels as a pledge, or security, for the re-payment of money lent thereon at a day certain, he has them upon an express contract or condition to restore them, if the pledgor performs his part by redeeming them. If a landlord distrains goods for rent, or a parish officer for taxes, these for a time are only a pledge in the hands of the distrainer, who is bound by an implied contract in law to restore them on payment of the debt and expenses before the time of sale; or, when sold, to render back the overplus. If a man delivers anything to his friend to keep for him, the receiver is bound to restore it on demand. If a man hires or borrows a horse for a month, he has the possession and a qualified property therein during that period; on the expiration of which his qualified property determines, and the owner becomes (in case of hiring) entitled to the possession of the horse and also to the price for which the horse was hired.

In each of these instances there is a special qualified property in the thing bailed transferred from the bailor to

the bailee, together with the possession. It is not an absolute property, because of the bailee's contract for restitution: the bailor having still left in him the right to a chose in action, grounded upon such contract. And, on account of this qualified property of the bailee in the thing bailed, he (as well as the bailor) may maintain an action against one who injures or takes away such a chattel. The tailor, the carrier, the inn-keeper, the agisting farmer, the pawnbroker, the distrainer, and the general bailee, may each of them vindicate, in his own right, this his possessory interest, against a stranger or third person. For, being responsible to the bailor, if the goods are lost or damaged by his default, or if he do not deliver up the chattel on lawful demand, it is therefore reasonable that he (the bailee) should have a right of action against any other person who may have purloined or injured them, in order that he may always be ready to answer the call of the bailor (x).

According to Lord Holt (y) there are six sorts of bailments:—(1) A bare naked bailment of goods, delivered by one man to another, to keep for the use of the bailor; this was called by the civilians *depositum* (z). (2) When goods or chattels are lent to a friend *gratis*, to be used by him, and this is called *commodatum*, because the thing is to be restored *in specie*. (3) When goods are left with the bailee, to be used by him for hire, this is called *locatio et conductio*, the lender being the *locator*, and the borrower the *conductor*. (4) When goods or chattels are delivered to another as a pawn, to be a security to him for money borrowed of him by the bailor, and this is called *radium*, a pawn, or pledge. (5) *Locatio operis faciendi*, when goods or chattels are delivered to be carried, or something is to be done about them for a reward, to be paid by the person who delivers them to the bailee, who is to do the

(x) See *Rooth v. Wilson*, 1 B. & Ald. 59. 909.

(z) See *Southcole's Case*, 4 Rep. 83.

(y) *Coggs v. Bernard*, Ld. Raym.

thing about them. (6) *Mandatum*, when there is a delivery of goods or chattels to somebody, who is to carry them, or do something about them *gratis*, without any reward for such his work or carriage.

The above celebrated classification of bailments has been much criticised and found fault with, and for practical purposes may be greatly simplified. Inasmuch, however, as the liability of a bailee must be determined by reference to the degree of care which he has exercised in regard to the subject-matter of the bailment, a tolerably precise meaning should at once be assigned to certain terms which are used in treating of the law of bailment.

Let us designate the degrees of diligence as slight, ordinary, and extraordinary, the degrees of negligence corresponding thereto will then be respectively gross, ordinary, and slight. Common or ordinary diligence being defined as that degree of diligence which men in general exert in respect to their own affairs—that common prudence which men of business and heads of families usually exhibit in conducting matters which interest them (*a*), less than this degree of care will constitute slight, and more than this will constitute extraordinary diligence; and the corresponding degrees of negligence will therefore be known or ascertainable. Gross negligence will, according to this scale, be negligence greater than that evidenced by the absence of ordinary care—of that degree of care which a man possessed of common prudence ought to take; and, after a similar fashion, the meaning of slight negligence may be made apparent.

Regard being had to the preceding paragraph, three leading classes of bailments may be thus characterized:—

1st. Where the trust is exclusively for the benefit of the bailor (*b*). Here slight diligence only in regard to the thing bailed is required from the bailee, unless he be possessed of special skill or knowledge in relation to

(*a*) Sir W. Jones, *Bailments*, 6; (*b*) *Coggs v. Bernard*, Ld. Raym. Story, *Bailments*, 5th ed. 15—18. 909.

it (c); and gross negligence alone will, except in the case of a skilled bailee, entail liability.

2ndly. Where the trust is exclusively for the benefit of the bailee. Here extraordinary care in regard to the chattel bailed is required from the bailee, who may even be liable for the negligence of his servant, without any consideration of personal negligence in hiring or keeping him. If the bailee of a horse, which has been gratuitously lent him, put it in his stable, and the horse be stolen, the bailee shall not be answerable. But if he or his servant leave the stable door open, and a thief steals the horse, the bailee will be chargeable by reason of his neglect and laches (d).

3rdly. Where the trust is for the mutual benefit of both parties to the bailment; and here the degree of care or diligence required from the bailee is intermediate between slight and extraordinary. This is by far the most important class of bailments, and in connexion with it must be noticed the doctrine of our law respecting lien.

Lien is a right, exerciseable in given cases over the chattel property of another, to retain such chattel until some charge attaching to and in respect of it has been satisfied (e).

Every bailee for hire has a lien on the subject-matter of the bailment, for compensation due to him in respect of his work and labour bestowed upon it; and therefore he is not bound, unless it be otherwise specially agreed, to restore the thing bailed until that compensation has been paid him (f). A tailor who has made clothes out of cloth sent to him by a customer, is not in strictness bound to deliver them to his employer until paid for the work and labour bestowed on them by his direction. Nor is a jeweller who has received a gem to set, or a seal to

(c) *Wilson v. Brett*, 11 M. & W. 113.

(e) Cross on Lien, 2.

(f) Story, Bailments, 5th ed.

(d) Ld. Raym. 916; *Dansey v. Richardson*, 3 E. & B. 144. 456.

engrave, bound to restore it until his charges for work bestowed upon it have been liquidated. In either of these cases the lien is designated as specific, *i.e.*, the right is co-extensive merely with the claim in respect of the work and labour bestowed upon the thing in question; it could not be asserted in regard to other debts or other claims which might have accrued to the bailee as against the bailor. Such a right of specific lien is recognised by our law as available in all trades, and under very dissimilar circumstances; whereas to support a general lien, *i.e.* a right to detain the thing bailed in respect of all outstanding antecedent claims, which is an "encroachment on the common law," evidence of usage to that effect in the particular trade or profession must be given (*g*), or at all events the question whether such a general right of lien exists in the particular case must have been affirmatively settled.

The right of lien is clearly founded on possession, and if, after the lien has attached, the party claiming it, or entitled to claim it, once part with the possession of the goods, the right of lien upon them will be gone (*h*). This particular remedy, moreover, must be enforced by the act of the person claiming it; our common law aids him merely by recognizing his right, but declines to give him the costs incurred in enforcing it, or to compensate him for damages, pecuniary or otherwise, which he may have sustained whilst enforcing it (*i*).

Bailment
to land car-
rier of
goods.

Within the last of the three leading classes of bailments previously mentioned, is included the bailment of goods to a common carrier. A common carrier is one who holds himself out to the public as undertaking to convey the goods of applicants from place to place. If a man profess to be a carrier, the law creates for him a duty to receive

(*g*) *Brandão v. Barnett*, 12 Cl. & F. 787.

Cross on Lien, 38.

(*h*) *Per Buller, J., Lickbarrow v. Mason*, 2 T. R. 72; 1 H. Bl. 357;

(*i*) *Somes v. British Empire Insur. Co.*, 8 H. L. Cas. 338.

goods brought to him for carriage, so that the carrier may incur liability for refusing to receive them (*k*). The common law duty thus imposed on the carrier may, however, in many respects, be regulated according to his will; for he may choose the kind of conveyance to be used, the times for transit, the mode of delivery, the articles which alone he will undertake to carry, what price he will charge for carriage, when he will be paid; moreover, the duty to receive is always limited by the capability to carry (*l*).

Further, according to our customary law, a common carrier is an insurer of the goods entrusted to him, that is to say, he is bound to deliver them safely, except when prevented from doing so by the act of God (*m*), or of the king's enemies; he is bound also to deliver within a reasonable time (*n*).

The policy of our law in thus holding that a carrier ensures is based on these considerations. Land carriers, it was thought by our ancestors, not without reason, might easily combine with thieves to pilfer the goods committed to their charge, and might effect this in so clandestine a manner as to evade detection. When goods are delivered to a carrier, they are usually no longer under the eye of their owner; he seldom follows them himself, or sends any agent with them to the place of their destination. If

(*k*) *Pickford v. Grand Junction R. C.*, 8 M. & W. 372; *Hales v. London and N. W. R. C.*, 4 B. & S. 66.

Lord Holt says (*Lane v. Cotton*, 12 Mod. 484) that wherever any subject takes upon himself a public trust for the benefit of the rest of his fellow-subjects, he is, *eo ipso*, bound to serve them in all things within the reach and comprehension of the trust which he has assumed. Upon this principle, an action will lie against a carrier if, his horses being not loaded, he refuse to take a

package proper to be sent by him.

No carrier is bound to receive goods which are "specially dangerous," 29 & 30 Vict. c. 69, s. 6.

(*l*) *Johnson v. North Midland R. C.*, 4 Exch. 367.

(*m*) The expression "act of God" is said by Dr. Story (Bailments, 5th ed. p. 536) to denote any natural accident, such as by lightning, earthquake, or tempest—natural in this sense, as not happening through the negligence of man.

(*n*) *Hales v. London and N. W. R. C.*, 4 B. & S. 66.

they should be lost or damaged, even by the grossest negligence of the carrier or his servants, or should be stolen by them or by others in collusion with them, the owner would most likely be unable to prove either of these causes of loss, for his witnesses must *ex necessitate* be the carrier's servants, who, not fearing contradiction, would excuse their masters and themselves (o).

Such was the reason for imposing on a carrier the peculiar liability of an insurer. To prevent litigation, collusion, and the necessity of investigating facts which could not satisfactorily be unravelled, the law presumed against the carrier, unless he showed that the injury complained of was done by the king's enemies, or was such as could not have happened by the intervention of man.

The doctrines of our common law affecting carriers mainly rested on notions of expediency and on a desire to protect traders, who are more vitally interested than others in having protection extended, by stringent rules and enactments, to goods and merchandise *in transitu*. Our courts, nevertheless, apply to mercantile transactions, when occasion requires, their own rules and maxims, in order to do substantial justice between parties. Therefore, a carrier, although an insurer, is not liable for damage arising from any inherent defect in goods delivered to him for conveyance, or from their being improperly packed, or from their being of a perishable nature, and so becoming deteriorated; nor is a carrier liable for leakage (p); for the owner of goods shall not be permitted to take advantage of his own wrong and, having

(o) *Riley v. Horne*, 5 Bing. 217; *Forward v. Pittard*, 1 T. R. 33—4; *Coggs v. Bernard*, Lord Raym. 909.

In *Southcote's Case*, 4 Rep. 84 a, we read that if a factor does all which he by his industry can do, he shall be discharged, and incur no liability; his duty is as a servant to merchandise the best he can, and a

servant is bound to perform the command of his master; but a common carrier who takes hire ought to keep the goods in his custody safely, and shall not be discharged if they are stolen by thieves.

(p) *Hudson v. Baxendale*, 2 H. & N. 575.

himself been guilty of negligence, to sue the carrier for damage thence resulting.

The duty of a carrier to deliver goods safely attaches in general upon the assumption that he has had the opportunity of securing to himself remuneration adequate to the risk cast upon him. If the carrier has not had that opportunity, or if circumstances make such protection reasonable, he may at common law, by a special acceptance, limit and restrict his responsibility (*q*). The notices which carriers used, prior to the Carriers' Act (11 Geo. 4 & 1 Will. 4, c. 68), to affix in their offices and receiving houses, accordingly rejected responsibility, unless the conditions of insurance of goods thereby stipulated for were complied with: these notices constituted special acceptances of goods, and imposed a limit to liability by the will of the carrier. Where the customer knew of the notice, and did not offer, and the carrier did not ask for, a premium, the carrier was protected by his notice. This notice, however, was held insufficient to protect the carrier if he were proved to have been guilty of gross negligence—an expression to which it was found difficult to affix a precise meaning. Damage done to the article entrusted to the carrier for conveyance, or the loss of such article, was held to afford some evidence of negligence, and the line between negligence and gross negligence was ill-defined (*r*). Hence, too extended a liability was gradually

(*q*) In *Morse v. Slue*, 1 Ventr. 238, Lord Hale said, "If a carrier will, he may make a caution for himself, which if he omits, and takes in goods generally, he shall answer for what happens." See *Phillips v. Edwards*, 3 H. & N. 813.

(*r*) In *Beal v. South Devon R. C.*, 3 H. & C. 337, the Court of Ex. Ch. observe that for "all practical purposes" the rule is this:—"the failure to exercise rea-

sonable care, skill, and diligence, is gross negligence. What is reasonable varies in the case of a gratuitous bailee and that of a bailee for hire. From the former is reasonably expected such care and diligence as persons ordinarily use in their own affairs, and such skill as he has. From the latter is reasonably expected care and diligence such as are exercised in the ordinary and proper course of similar business, and such skill

thrown by the current of judicial decisions upon the carrier; and the legislature interposed, and by the 11 Geo. 4 & 1 Will. 4, c. 68, granted to land carriers reasonable protection in respect of the articles (*s*) specified in sect. 1 of that statute, unless the customers insure.

As to the articles there enumerated, when exceeding in value 10*l.*, the statute provides that notices may be fixed up in the carrier's office or receiving house, which will bind the customer, without proof of their having come to his knowledge, provided sundry regulations contained in the act are duly conformed to. The mode of proceeding under the Carrier's Act is this:—the customer should tender to the carrier the article to be carried and declare its value, and the carrier who acquires a right to an increased rate of charge for valuable articles, by reason of being an insurer, should make that charge, and the customer should either pay it, and so be protected against loss, or refuse to pay it; and then the carrier, though bound to carry, would not, in case of loss, be liable (*t*). If a carrier, when the value of the goods tendered for carriage has been declared, omits to demand the increased rate of charge specified in his notice, he will still be liable for loss of the goods, although the higher rate of charge be not paid (*u*).

In regard to articles not enumerated in sect. 1 of the Carriers' Act, all notices, such as carriers had been accustomed to put up in their offices, and just now alluded to, are by sect. 4 invalidated. But by sect. 6 (*v*), a carrier is

as he ought to have, namely, the skill usual and requisite in the business for which he receives payment."

(*s*) Which are often of great intrinsic value, though small in bulk, such as, *inter alia*, gold or silver coin, jewellery, bills of exchange, bank notes, and securities for the payment of money, pictures, plate, china, silks, furs, or lace (unless

machine-made, 28 & 29 Vict. c. 94, s. 1). See *Treadwin v. Great Eastern R. C.*, L. R., 3 C. P. 308.

(*t*) *Hart v. Bazendale*, 6 Exch. 769, 790.

(*u*) *Behrens v. Gt. Northern R. C.*, 7 H. & N. 950; 6 *Id.* 366.

(*v*) See *Bazendale v. Great East. R. C.*, L. R., 4 Q. B. 244.

still empowered to restrict his liability by a special contract (which is the statutory term) or agreement between his customer and himself, such agreement being evidenced either by notice acquiesced in, or document signed, by the customer.

The case of loss caused by the felonious act of the carrier's servants is, by sect. 8, taken altogether out of the operation of the statute (*x*).

The next important enactment affecting carriers, is "The Railway and Canal Traffic Act" (17 & 18 Vict. c. 31); under sect. 2 of which a company, within the purview of the act (*y*), is required to afford "all reasonable facilities" for the receiving, forwarding, and delivering of traffic; and such companies are precluded from giving "any undue or unreasonable preference or advantage" to any person, or from subjecting him, or any particular description of traffic, to "undue or unreasonable prejudice or disadvantage in any respect whatsoever." Under sect. 3, a company infringing these provisions of the act may be restrained from continuing to do so by injunction.

Before the powers conferred by these two sections are put in motion, the court must be satisfied that some undue preference is being shown to an individual, or that some substantial damage is being done or inconvenience caused to the public (*z*); and they must further be satisfied that the complaint is *bonâ fide* made on behalf of the public, for whose benefit—not for that of individuals—the statute must be taken to have been passed (*a*). A complaint of undue preference is often founded on and supported by evidence of inequality of charge. The intention manifested in the act was to give equal advantages, so far as the rate of charge is concerned, to all persons similarly circum-

(*x*) *Machu v. London and South Western R. C.*, 2 Exch. 432; *Metcalfe v. London, Brighton, &c., R. C.*, 4 C. B. N. S. 307, 311.

(*y*) See sect. 1 (the interpretation

clause).

(*z*) *Ex parte Painter*, 2 C. B. N. S. 702.

(*a*) *Re Beadell*, 2 C. B. N. S. 509.

stanced. A railway company, indeed, may be entitled to lay down rules in reference to special circumstances, provided in doing so they act *bond fide* with regard to their own interests and those of the public; but they are not at liberty to make particular bargains with particular individuals, whereby one person is benefited and another injured (*b*).

The 7th section of the Railway and Canal Traffic Act is very material; it enacts as follows:—That every company to which it applies “shall be liable for the loss of, or for any injury done to any horses, cattle, or other animals, or to any articles, goods, or things in the receiving, forwarding, or delivering thereof, occasioned by the neglect or default of such company or its servants, notwithstanding any notice, condition, or declaration made and given by such company contrary thereto, or in anywise limiting such liability;” every such notice, condition, or declaration being declared to be null and void: but the company may make such conditions with respect to the receiving, forwarding, and delivering of any of the said animals or things as shall be adjudged by the court or judge before whom any question relating thereto is tried, to be “just and reasonable.” Provided, however, that no greater damages shall be recovered for loss of or for injury done to any of such animals, beyond the sums specified in the act (*c*), “unless the person sending or delivering the same to such company shall, at the time of such delivery, have declared them to be respectively of higher

(*b*) *Garton v. Bristol and Exeter R. C.*, 6 C. B. N. S. 639; *Harris v. Cockermouth and Workington R. C.*, 3 C. B. N. S. 693; *Ransome's Case*, 1 C. B. N. S. 437; *Re Caterham R. C.*, *Id.* 410; *Re Palmer v. London and South Western R. C.*, L. R. 1 C. P. 588.

In the Special Act constituting a railway company, an “equality

clause” is usually if not always inserted, which is meant to regulate the dealings of the company with their customers. See *Baxendale v. South Western R. C.*, L. R. 1 Ex. 137.

(*c*) That is to say—for any neat cattle, per head, 15*l.*; for any sheep or pigs, per head, 2*l.*

value" than that mentioned in the act, in which case the company may demand and receive, by way of compensation for the increased risk and care thereby occasioned, a reasonable per-centage upon the excess of the value so declared above the respective sums limited in the act: and such per-centage or increased rate of charge shall be notified in the manner prescribed in the Carriers' Act (sect. 2), and shall be binding upon the company as therein mentioned: provided also, that "the proof of the value of such animals, articles, goods, and things, and the amount of the injury done thereto, shall in all cases lie upon the person claiming compensation" for the loss or injury sustained. Further, no "special contract" between a railway or canal company and any person respecting the receiving, forwarding, or delivering of any animals, articles, goods, or things, will be valid and binding unless signed by him or by the person delivering the animals or things for carriage.

The above enactment does not alter or affect the rights, privileges, or liabilities of any railway or canal company with respect to articles such as mentioned in sect. 1 of the Carriers' Act; and as regards cattle, horses, and other goods, not within the previous statute, a contract between the company and a customer, if just and reasonable, and signed as required, will be efficacious to relieve the company from an undue degree of liability (*d*).

The course of legislation in regard to carriers such as we have been considering, terminates for the present with

(*d*) The leading case upon this enactment is *Peck v. North Staffordshire R. C.*, 10 H. L. Cas. 473. There the effect of a condition which was contained in a contract between the company and their customer, would, if valid and operative, have been to exempt the company from responsibility for damage done to the customers' goods, how-

ever caused, *ex. gr.* if caused by gross negligence, by fraud, or dishonesty on the part of the servants of the company; this condition was held to be neither just nor reasonable.

See also *M'Manus's Case*, 4 H. & N. 327; *Lord v. Midland R. C.*, L. R. 2 C. P. 339; *Rooth v. North Eastern R. C.*, L. R. 2 Ex. 173.

an important provision contained in the 31 & 32 Vict. c. 119, which enacts, that where a company by through-booking contracts to carry any animals, luggage, or goods from place to place, partly by railway or canal and partly by sea, a condition exempting the company from liability for any loss or damage which may arise during the carriage of such animals, luggage, or goods by sea, from "the act of God, the king's enemies, fire, accidents from machinery, boilers, and steam, and all and every other dangers and accidents of the seas, rivers, and navigation of what nature and kind soever," shall, if published conspicuously in the office where such through-booking is effected, and if legibly printed on the receipt or freight note given by the company for the animals, luggage, or goods, be valid as part of the contract between the consignor and the company, in like manner as if the company had signed and delivered to the consignor a bill of lading containing such condition (*f*). And where a railway company works steam vessels in connection with its land traffic, the provisions of the stat. 17 & 18 Vict. c. 31, so far as applicable, have been, by the above more recent enactment, extended to such steamers and the traffic carried on thereby; and some special regulations for securing equality of treatment of passengers using such steamers have been promulgated (*g*).

A carrier's liability in respect of goods committed to his charge ordinarily continues until the delivery of the goods either is completed or has been waived by the owner. As soon as the goods have reached their destination, and no further duty remains to be discharged by the carrier in reference to them, his liability as such ceases (*h*). He may, however, thereupon assume another character, and with it another liability. A carrier, when the transit of the goods is ended, may, for instance,

(*f*) 31 & 32 Vict. c. 119, s. 14.

(*g*) 31 & 32 Vict. c. 119, s. 16.

(*h*) See Chitty and Temple on the

Law of Carriers, p. 86; *Shepherd v. Bristol and Exeter R. C.*, L. R. 3 Ex. 189.

assume the character of warehouseman, and then it may be matter of much nicety (supposing the goods entrusted to him to be lost or damaged) to decide in which character the bailee is to be held answerable for them: and this question is one of importance, forasmuch as damages may on one view of the case be recoverable, which would not be so on the other. Thus, a common carrier is liable for loss by fire, unless caused by the act of God, whereas a warehouseman is not liable for loss by fire unless he has been guilty of negligence (*i*).

Again, a carrier, in consideration of the compensation paid to him as such, may undertake to act also as warehouseman for a reasonable time, should the goods for so long be allowed to remain in his custody. On this state of facts, the remuneration for carrying is meant to cover the risk of warehousing; also, if the goods be negligently lost whilst warehoused, the liability of the carrier and warehouseman will be that which attaches to a bailee for hire, not that which attaches to a gratuitous bailee (*k*). The liability of a warehouseman ordinarily begins as soon as the goods arrive at the warehouse and the crane is applied to raise them into it. It ends when the goods are delivered to the owner or his order (*l*).

Inasmuch as a railway company sometimes establishes a line of steamers plying in connection with its trains, a loss of goods delivered to the company for conveyance might occur whilst such goods were in the hands of the company as wharfingers, not as carriers or as warehousemen. The liability of a wharfinger is that of a depositary for hire; he must extend ordinary or reasonable diligence to the thing bailed: and the principal difficulty here may be in determining when the custody of the goods by the company in the capacity of wharfingers begins and when it terminates. Goods are often in a wharfinger's posses-

(*i*) *Garside v. Trent and Mersey Navigation*, 4 T. R. 581. 258.

(*l*) Story, *Bailments*, 5th ed., p.

(*k*) *Cairns v. Robins*, 8 M. & W. 466.

sion with a view to being put on board ship for exportation, and in this case a delivery of the goods into the possession, actual or constructive, of the owners of the ship will discharge the wharfinger from liability (*m*). And even where the goods sustained damage whilst actually in the custody of the wharfinger and by his negligence, he may possibly succeed in showing that they were then in his custody gratuitously, and that he has not been guilty of gross negligence, in respect of which alone a gratuitous bailee is answerable (*n*).

Land carriers of passengers.

The old customary law of England which applies to *bona et catalla*, is not altogether applicable to the persons of passengers conveyed by a land carrier, nor do the statutory provisions which have latterly been under our notice apply to them. When a passenger has paid for and received his ticket at the booking office (*o*) of a railway company for conveyance from one terminus to another, this ticket indicates in some sort the journey which the passenger is to take; so that we have thus presented to us the essential elements of a contract, executed on the one side by payment of the fare, and executory on the other between the passenger and the company. We have the consideration in the shape of money moving from the passenger, and an undertaking by the company to convey him, of which the extent and limits are set forth more or less precisely on the ticket. When this contract has been entered into, the company do not, as does a common carrier of goods, insure against all injuries unless caused by the act of God or by public enemies; they undertake merely that they and their agents are possessed of competent skill, and that they will use all due care and diligence in the performance of their duty. A carrier of passengers is only liable for negligence (*p*), and the duty cast upon

(*m*) Story, Bailments, 5th ed., 474.

(*n*) *White v. Humphery*, 11 Q. B. 43.

(*o*) In which the fares payable for

tickets there issued must be posted up, 31 & 32 Vict. c. 119, s. 15.

(*p*) *Crofts v. Waterhouse*, 3 Bing. 319, 321.

him will consequently be to carry safely those whom he receives as passengers so far as human care and foresight will avail (q).

But although a carrier of passengers does not insure their safety, it may be almost superfluous to observe that for negligence causing personal hurt to a passenger, whether *in transitu*, at the terminus, or at a roadside station, a railway company will, in the absence of misconduct or contributory negligence by the passenger himself, be clearly responsible (r). A passenger carrier, moreover, holding himself out as such, seems bound to carry, so far as his means of accommodation may avail, any person being in a fit state to associate with his fellows and duly tendering his money for conveyance (s). And an obligation is imposed on a railway company, by the issue of a passenger ticket for a certain train, to forward the passenger by that particular train without undue delay or retardation. Circumstances may doubtless qualify this obligation, for although on the one hand the company could not exonerate themselves from it by arbitrarily limiting the number of carriages composing the train in question, yet on the other hand, out of regard to safety, they might well be justified in declining to attach additional carriages to the engine, or to run extra trains for the accommodation of those who had bought tickets; though in this case the passage-money received might have to be refunded by the company on demand.

In order, also, to charge a company such as spoken of

(q) As to the duty of a railway company in providing a roadworthy carriage for passengers, see *Redhead v. Midland R. C.*, L. R. 2 Q. B. 412.

(r) See, as exemplifying the text, *Martin v. Great Northern R. C.*, 16 C. B. 179; *Siner v. Great Western R. C.*, L. R. 4 Ex. 117; *Great Northern R. C. v. Harrison*,

10 Exch. 376; *Toomey v. London, Brighton, and South Coast R. C.*, 3 C. B. N. S. 146; *Cornman v. Eastern Counties R. C.*, 4 H. & N. 781.

(s) *Denton v. Great Northern R. C.*, 5 E. & B. 860; *Briddon v. Great Northern R. C.*, 23 L. J. Ex. 51.

for damage caused by the unpunctuality of a train, evidence must be given of some undertaking or representation by the company or their servant that the train in question is to arrive within a given time at the station named. The mere expression of an opinion to that effect by an agent of the company would not suffice (*t*). And as regards passenger trains, we must remember that railway companies almost invariably protect themselves against the consequences of any irregularity in their departure and arrival by inserting notices in their time-tables that they do not warrant that the trains will arrive and depart at the precise times indicated (*u*). The liability of the company may further be modified by their special act and bye-laws (*x*).

A passenger who has conformed to the regulations of a railway company concerning luggage (*y*), by paying for it, if required, and duly placing it in their custody, may sue the company for its loss, or for damage done to it, unless disentitled to do so by his own fraud (*z*). Further, although in general an action against a carrier for loss of goods may be founded indifferently in contract, or in tort for negligence and breach of duty, this proposition must not be lost sight of, that an action *ex contractu* needs privity to support it, whereas a duty may be owing to one with

(*t*) *Hurst v. Great Western R. C.*, 19 C. B. N. S. 310.

(*u*) *Lord v. Midland R. C.*, L. R. 2 C. P. 339, 345.

(*x*) See *Jennings v. Gt. Northern R. C.*, L. R. 1 Q. B. 7. *Dearden*, app., *Townsend*, resp., *Id.* 10.

(*y*) Luggage may be said to include such articles of necessity or convenience as usually accompany passengers for their personal use, not merchandise or valuables designed for sale. See *Phelps v. London and North Western R. C.*, 19 C. B. N. S. 321. *Story*, *Bailments*, 5th ed., 527.

(*z*) A common form of fraud or attempted imposition upon a railway company is the putting of merchandise into the luggage of the passenger, with a view to avoiding payment of the fare which might be demanded for it. *Rumsey v. North Eastern R. C.*, 14 C. B. N. S. 641. Under such circumstances no undertaking or contract arises by the company in regard to the merchandise, so as to enable the passenger to sue for loss of it. *Belfast and Ballymena R. C. v. Keys*, 9 H. L. Cas. 556.

whom no privity exists (*a*). In such an action, if rightly brought, damage legally and naturally flowing from the breach of contract or of duty is recoverable (*b*).

Where, as now frequently happens, a railway company possesses at its principal termini and stations hotels for the accommodation of passengers, liabilities may attach to such a company in the character of innkeepers differing essentially from those which attach to them as carriers.

An innkeeper is at common law bound to receive a guest, and to find for him reasonable and proper accommodation (*c*). He is bound, also, to take due care of the goods and baggage of his guest deposited in his house, and to keep them day and night without abstraction or loss. The innkeeper is accordingly liable for the felonious taking of goods placed in his custody as innkeeper, and is responsible for the acts of his servants; indeed the property of a guest is, by legal implication, in the actual care and custody of the innkeeper, who by custom is responsible for its safety—at all events with some rare exceptions, such as the act of God or the king's enemies (*d*). And the innkeeper is bound in law to keep the property of his guest safe, without any stealing or purloining (*e*), provided it be within the inn or its appurtenances; for if a man comes to a common inn, and delivers his horse to the ostler, directing that it be put to pasture, which is done, and the horse is stolen, the innkeeper will not be liable, because he is answerable for nothing that is out of his inn, but for such things only as are within it (*f*). The innkeeper would not, however, at common law, be liable for

(*a*) *Martin v. Great Indian Pe-* 269, 276.
nins. R. C., L. R. 3 Ex. 9.

(*b*) *Hadley v. Bazendale*, 9 Exch.
341; *Woodger v. Gl. Western R.*
C., L. R. 2 C. P. 318.

(*c*) *Fell v. Knight*, 8 M. & W.

(*d*) *Dansey v. Richardson*, 3 E. &
B. 144.

(*e*) *Calye's Case*, 8 Rep. 32.

(*f*) *Calye's Case*, *supra*; *Dansey*
v. Richardson, 3 E. & B. 144.

loss of goods placed in a room of which his guest had the special charge, or where such loss was occasioned by the guest's own negligence (*f*).

The responsibility imposed upon an innkeeper at common law has been much diminished by the stat. 26 & 27 Vict. c. 41, reciting that "it is expedient to amend the law concerning the liability of innkeepers in respect of the goods of their guests." It enacts as follows—That no innkeeper shall be liable to make good to his guest any loss of or injury to goods or property brought to his inn (*g*) (not being a horse or other live animal, or any gear appertaining thereto, or any carriage) to a greater amount than the sum of 30*l.*, except—(1.) Where such goods or property have been stolen, lost, or injured through the wilful act, default, or neglect of the innkeeper or any servant in his employ; or (2.) Where such goods or property have been deposited expressly for safe custody with the innkeeper, provided that in the case of such deposit the innkeeper may, if he think fit, require, as a condition of his liability, that such goods or property shall be deposited in a box or other receptacle, fastened and sealed by the person depositing the same (*h*).

If, however, the innkeeper refuse to receive for safe custody, as just mentioned, the goods or property of his guest, or if such guest, through any default of the innkeeper, be unable to deposit his goods or property as

(*f*) *Burgess v. Clements*, 4 M. & S. 306; *Cashill v. Wright*, 6 E. & B. 695; *Morgan v. Ravey*, 6 H. & N. 265.

(*g*) By sect. 4, "the word 'inn' shall mean any hotel, inn, tavern, public-house, or other place of refreshment, the keeper of which is now by law responsible for the goods and property of his guests; and the word 'innkeeper' shall mean the keeper of any such

place."

(*h*) Sect. 1. Of this section the innkeeper must cause at least one copy, printed in plain type, to be exhibited in a conspicuous part of the hall or entrance to his inn, and he will be entitled to the benefit of the act in respect of such goods or property only as may be brought to his inn while such copy shall be so exhibited. Sect. 3.

aforesaid, the innkeeper will not be entitled to the benefit of the act in respect thereof (*i*).

Although, as recently decided, the Carriers' Act extends ^{Carriers by water.} protection where the contract is to carry goods partly by land and partly by water, and the loss has occurred during the transit by land (*j*), it does not apply to the conveyance of goods in a sea-going ship. In this case, accordingly, the parties interested must protect themselves by mutual stipulations, though the legislature has from time to time interposed with a view to modifying their arrangements.

The contract by which an entire ship, or some principal part of it, is let to a merchant for the conveyance of goods on a determined voyage to one or more places, is termed a charter-party (*k*), the charterer of the ship causing it to be laden wholly or in part with goods belonging to other persons; in relation to whom it seems that he is to be considered as owner of the ship (*l*). Now, when goods are put on board ship in pursuance of a charter-party, the practice is that the master signs for them bills of lading, usually two or three in number, the charter-party being the instrument and evidence of the contract for conveyance, and the bill of lading the evidence of the shipping of the particular merchandize to be conveyed (*m*). This latter instrument operates in part as an acknowledgment that the goods specified in it have been shipped, and in part operates as an undertaking that such goods shall be delivered at the distant port to the consignee or his assigns, or to the order of the consignor, in like condition, subject to certain exceptions, as when shipped (*n*).

(*i*) Sect. 2.

(*j*) *Le Conteur v. London and So. West. R. Co.*, L. R. 1 Q. B. 54.

(*k*) Abbott on Shipp., 11th ed., 195.

(*l*) *Id.* 34.

(*m*) *Id.*, 235.

(*n*) As to the passing of the property in goods by a delivery of the bill of lading, see *Shepherd v. Harrison*, L. R. 4 Q. B. 196.

The bill of lading is thus a symbol of the property referred to in it, and, as formerly stated (*o*), the vendee and consignee of goods at a distant port may, by assigning over this instrument to a *bond fide* transferee, defeat the right of stoppage *in transitu* vested in the vendor in the event of his (the vendee's) insolvency; upon this rule, however, being engrafted the qualification that by indorsing over the bill of lading, the vendor's right may be defeated. The actual holder of an indorsed bill of lading may consequently, by indorsement, transfer a greater right than he himself had; that is to say, he may give an indefeasible right in lieu of the defeasible title which he himself possessed (*p*). This peculiar property of a bill of lading is derived from its negotiable quality, and is limited to the case where the person who transfers the right is himself in possession of, and in a situation to transfer the instrument (*q*).

The stat. 18 & 19 Vict. c. 111, intituled "An Act to amend the Law relating to Bills of Lading," leaves un-

(*o*) *Ante*, pp. 163—5.

(*p*) *Jenkyns v. Usborne*, 7 M. & Gr. 699.

(*q*) We read in a recent judgment the following passage explanatory of the text. A bill of lading, in the common form, for the delivery of goods to "order and assigns," is a negotiable instrument which, by indorsement and delivery, passes the property in the goods to the indorsee, subject only to the right of an unpaid vendor to stop them *in transitu*. The indorsee may deprive the vendor of this right by indorsing the bill of lading for valuable consideration, although the goods are not paid for, or bills have been given for the price of them which are certain to be dishonoured, provided the indorsee for value has

acted *bond fide* and without notice. Although a bill of lading is a negotiable instrument, it is so only as a symbol of the goods named in it; and although the shipper may have indorsed in blank a bill of lading deliverable to his assigns, his right is not affected by an appropriation of it without his authority; and if it be stolen from him or transferred without his authority, a subsequent *bond fide* transferee for value cannot make title under it as against the shipper of the goods, for in the cases put there could be no lawful assigns of the shipper, and consequently the bill of lading could have no existence as a negotiable instrument. Judgm., *Pease v. Gloaghe*, L. R. 1 P. C. 227—228, citing *Gurney v. Behrend*, 3 E. & B. 634.

touched the right of stoppage *in transitu* enjoyed by the consignor of goods; by its first section, however, there is vested in the indorsee of a bill of lading the right to sue and the liability to be sued upon it in like manner as if the contract contained therein had been made with himself(*r*). Moreover, by sect. 3 of the same statute, the bill of lading in the hands of a consignee or indorsee for value, representing goods to have been shipped on board a vessel, is now conclusive evidence of such shipment as against the master or other person signing it, notwithstanding that such goods, or some part thereof, may not have been so shipped, unless the holder of the bill of lading had actual notice on receiving the same that the goods had not been in fact put on board; and the master or other person signing the bill may exonerate himself in respect of such misrepresentation by showing that it was caused without any default on his part, and wholly by the fraud of the shipper, or of the holder, or some person under whom the holder claims(*s*).

A bill of lading signed by the captain of a ship is not only an acknowledgment by him of the receipt of the goods mentioned in it, it is also an undertaking that such goods are to be delivered, in like "good order and condition," at the distant port—subject, however, to these important exceptions—"the act of God, the queen's enemies, fire, and all and every other dangers and accidents of the sea, rivers, and navigation of what kind and nature soever." Within one or other of these exceptions, therefore, or of any additional exceptions which may be inserted, it behoves the shipowner, if charged for loss of, or damage done to, the goods, to bring himself(*t*), though his liability to make compensation for

(*r*) *Dracachi v. Anglo-Egyptian Nav. Co.*, L. R. 3 C. P. 190.

(*s*) See *Jessel v. Bath*, L. R. 2 Ex. 267.

(*t*) *Kay v. Wheeler*, L. R. 2 C. P. 302; *Ohrloff v. Briscall*, L. R. 1 P. C. 231; *Phillips v. Clark*, 2 C. B. N. S. 156.

such loss or damage has been limited, as presently mentioned.

Where an express contract has been entered into for the conveyance of a passenger on board a sea-going ship, the rights of the parties will be governed by its terms, interpreted by the usage of the particular trade or voyage ; and where the contract is not express, it may be evidenced by such usage (*u*). By reason, however, of the impositions practised upon passengers on board ship, and the hardships to which they are often subjected, various enactments (*x*) have been made by the legislature containing provisions calculated to promote their safety, health, personal comfort, and well-being.

Regard being had, however, to the provisions of Lord Campbell's Act (*y*), and to the great pecuniary responsibilities which might attach to shipowners in case of loss, the statute law provides as follows :—

That the owners of any ship, whether British or foreign, shall not, where any of the following events occur without their actual fault or privity—*sc.*, where loss of life or personal injury is caused to any person carried in such ship, or where damage or loss is caused to any goods, merchandize, or other things whatsoever on board such ship—be answerable in damages to an aggregate amount exceeding 15*l.* per ton of the ship's tonnage in respect of loss of life or personal injury, either alone or together with loss of, or damage to, goods, merchandize, or other things, nor to an aggregate amount exceeding 8*l.* per ton of the ship's tonnage in respect of loss of, or damage to, goods, merchandize, or other things, whether there be in addition loss of life or personal injury or not (*z*). And further, it is provided that no owner of any sea-going ship

(*u*) Abbott on Shipp., 11th ed., 31 & 32 Vict. c. 119.
186—7.

(*y*) *Ante*, pp. 150, 151.

(*x*) 17 & 18 Vict. c. 104, amended
by 26 & 27 Vict. c. 51 ; see also

(*z*) 25 & 26 Vict. c. 63, s. 54.

shall be liable to make good, to any extent whatever, any loss or damage which may happen without his actual fault or privity to any goods or merchandize on board such ship by reason of fire, or to any gold, silver, diamonds, watches, or precious stones on board such ship by reason of robbery or embezzlement thereof, unless the owner or shipper of the same has, at the time of shipment, inserted in his bills of lading, or otherwise described in writing to the master and owner of such ship the true nature and value of such articles, or beyond the value of the ship and its freight, where, without his actual fault or privity, any damage or loss is caused to goods, merchandize, or other things on board such ship (*a*).

We have thus considered in order the three points specified at page 154 as deserving to be noticed in connection with a simple contract, the last of these having been "the thing to be done or not to be done." In treating, under this head, of various species of contracts, an arrangement was adopted which may have appeared to the reader in some respects defective, contracts having been divided into: (1), such as are required by statute or (2) by mercantile usage to be in writing; and (3), other contracts (*b*). Such a division of the subject, however, was adopted on the ground of its simplicity and practical utility, rather than because it is strictly accurate. Some important species of contracts are, from their very nature, almost necessarily evidenced by writing; and to others, which mainly fall under the particular head heretofore assigned to them, writing has, by positive enactment, in this or that particular been made essential. Such discrepancies, which to the logician may seem objectionable, in truth result from the combination and admixture, according to our constitutional system, of a written with

(*a*) 17 & 18 Vict. c. 104, s. 503.

(*b*) *Ante*, p. 159.

an unwritten law, from the mode in which our written law has, from time to time, been fashioned and put together, and from the gradual though ceaseless influence of mercantile usage, which has fixed its enduring impress upon our law of contracts.

CHAPTER X.

JURISDICTION OF SUPERIOR COURTS OF LAW. WRONGS TO PERSONAL PROPERTY.

IN pursuance of the plan indicated at a former page (*a*), we shall now enquire as to such wrongs as directly or indirectly affect the rights of property, and the remedies which our law has given to repair or redress them. In the present Chapter we shall speak of wrongs to personal, and in the ensuing Chapter of wrongs to real property, in accordance with our former division of property into personal and real (*b*): personal, which consists in goods, money, and all other moveable chattels, and things thereunto incident; a property which may attend a man's person wherever he goes, and from thence receives its denomination: and real property, which consists of such things as are permanent, fixed, and immoveable; as lands, tenements, and hereditaments, which are not annexed to the person, nor can be moved from the place in which they subsist.

We may, however, *in limine*, observe that torts cognisable at law may arise under circumstances akin to, or identical with, some which in the pages immediately preceding have been mentioned—fraud, negligence, or breach of duty, when causing damage, being usually remediable by action. Here, therefore, certain nice distinctions must be noticed—especially between warranty and false representation, and between negligence or breach of duty and breach of contract.

(*a*) *Ante*, p. 154.

(*b*) See Book II. ch. 2.

A contract, as formerly stated, is express or implied. A person who contracts as agent thereby impliedly undertakes and warrants that he has authority in that capacity to contract; and should he, in fact, have no such authority, he will be answerable according to the facts, *i. e.*, the absence or presence of fraud, to an action of contract or of tort, in which may be recovered compensation for damages resulting as a direct consequence in the ordinary course of affairs from the alleged breach of contract or of faith (*c*); indeed, it holds generally true that if A fraudulently makes a representation which is false, and which he knows to be false, to B—, meaning that B shall act upon it, and B, believing it to be true, does act upon it, and so sustains damage, B may have an action against A for the deceit—there being here such a conjunction of wrong and loss as will entitle the injured party to redress (*d*); and a principal is clearly responsible for damage caused by the fraud or misrepresentation of his general agent, though difficulty may occur in fixing the principal with responsibility for the fraud of a particular agent (*e*). Again, if the vendor of an article, upon the sale, warrants it to be good, the law annexes a tacit contract to this warranty, that if it be not so, he shall make compensation to the buyer in an action purely *ex contractu* (*f*); whereas should there be

(*c*) *Collen v. Wright*, 7 E. & B. 301; 8 *Id.* 647; *Simons v. Patchett*, 7 E. & B. 568; *Randell v. Trimen*, 18 C. B. 786; *Spedding v. Nevell*, L. R. 4 C. P. 212.

Where a contract is signed by one professing to sign "as agent," but who has no principal existing at the time, and the contract would be wholly inoperative, unless binding upon the person who signed it, he is personally liable on the contract, and a stranger cannot, by a subsequent ratification of the contract, relieve the party signing it from that liability. *Kelner v. Bax-*

ter, L. R. 2 C. P. 174.

(*d*) *Gerhard v. Bates*, 2 E. & B. 498—9; *Pasley v. Freeman*, 3 T. R. 51; *Mullett v. Mason*, L. R. 1 C. P. 559.

(*e*) *Barwick v. English Joint Stock Bank*, L. R. 2 Ex. 259; *Udell v. Atherton*, 7 H. & N. 172.

(*f*) A general warranty may not, however, extend to guard against a defect that is plainly and obviously the object of one's senses, as if a horse be warranted perfect, and wants either a tail or an ear, unless the buyer in this case be blind. But if cloth is warranted to be of

fraud in the transaction, an action on the case would lie to recover damages; *ex. gr.*, if the vendor, knowing the goods to be unsound, used any art to disguise them, he would be answerable. Also, at common law, an action would lie for fraudulently marking iron with a stamp in imitation of the plaintiff's stamp, and selling it under pretence that it was the genuine manufacture of the plaintiff (*g*). And it has recently been enacted (*h*) that the vendor of an article bearing a trade mark shall be deemed to warrant that such mark is genuine, and not wrongfully used, unless the contrary be expressed in writing signed by or on behalf of the vendor, and delivered to and accepted by the vendee (*i*). Further, that where a person sells a chattel bearing upon it any indication of its quantity, measure, or weight, or of the place in which it was manufactured, or produced, the sale or contract to sell shall be deemed to have been made with a warranty by the vendor that no such indication was in any material respect untrue, unless the contrary be expressed in manner aforesaid (*k*).

In cases such as have been specified, the form of remedy appropriate will, in the absence of express legislative intervention, be determined by applying this test: was there an ingredient of fraud and *mala fides* in the transaction under notice, or is there evidence merely of breach of contract?

such a length, when it is not, there an action *ex contractu* lies for damages; for that cannot be discerned by sight, but only by a collateral proof, the measuring it. And if a horse is warranted sound, and he wants the sight of an eye, though this seems to be the object of one's senses, yet as the discernment of such defect is frequently matter of skill, it has been held that an action lies to recover damages for this imposition; Salk. 211.

(*g*) *Crawshaw v. Thompson*, 4 C. B. 357.

(*h*) 25 & 26 Vict. c. 88.

(*i*) Sect. 19.

(*k*) Sect. 20.

A person aggrieved by the forging or counterfeiting of a trade mark may recover damages against the guilty party (s. 22), and a conviction for any offence under the statute will not affect the civil remedy (s. 11).

Negligence may be defined to be the omission to do something which a reasonable man, guided by those considerations which ordinarily regulate the conduct of human affairs, would do, or the doing of something which a prudent and reasonable man would not do (*l*). Negligence thus defined when productive of damage to an individual is actionable, and proof of negligence may, as appears from instances adduced in the preceding Chapter, suffice in support of an action founded upon breach of contract. Thus, there is in law an implied contract with a common inn-keeper, to secure his guest's goods in his inn; with a common carrier, to be answerable for the goods he carries; with a common farrier, that he shoes a horse well, without laming him; with a common tailor, or other workman, that he performs his business in a workmanlike manner; in which, if he fail, an action lies to recover damages for such breach of undertaking. And when a skilled labourer or artist is employed to do work, there is on his part an implied warranty that he has skill and is reasonably competent for the task which he assumes to perform. The public profession of an art is a representation and undertaking to all that the professor possesses the requisite ability and skill. There is here an implied contract to that effect, whereas a person not thus holding himself out as an expert would incur liability for want of reasonable skill, only in virtue of an express contract that he possessed or would exercise it (*m*).

Negligence, indeed, is comprised within the more general expression breach of duty, in reference to which it is established that where the law casts any duty upon a person which he refuses or fails to perform, he is answerable in an action to one whom his refusal or failure damages, for one who undertakes any office, employment, trust, or duty, contracts with those who employ or trust him, to

(*l*) *Blyth v. Birmingham Water-works Co.*, 11 Ex. 781, 4.

(*m*) *Harmer v. Cornelius*, 5 C. B. N. S. 236.

perform it with integrity, diligence, and skill (*n*). And, if by his want of either of those qualities any damage accrues to an individual, such person has in general a remedy by action. A few instances will illustrate this matter. If an officer of the public is guilty of neglect of duty, or a palpable breach of it, of non-feasance or of mis-feasance; as, if the sheriff does not execute a writ sent to him, or if he wilfully makes a false return thereto; in both these cases the party aggrieved may have an action against the sheriff for damages to be assessed by a jury (*o*). So negligence or breach of duty may, in accordance with the above principle, be imputed to the trustees of works to the use of which the public on payment of tolls or otherwise are entitled, as well if such trustees wilfully omit to avail themselves of means of knowledge respecting the condition of the works which they have in charge as if the actual existence of such knowledge be brought home to them, and for damage resulting from their neglect of duty, where established, they will in either case be liable (*p*).

Circumstances evidencing negligence or breach of duty may be infinitely various (*q*), sometimes giving rise indifferently to an action of contract or of tort, and sometimes to an action *ex delicto* only. With a view therefore to exemplifying the differences between breach of contract and negligence or breach of duty, the following state

(*n*) *Ferguson v. Earl of Kin-noull*, 9 Cl. & F. 251.

(*o*) See *Hooper v. Lane*, 6 H. L. Cas. 443.

(*p*) *Mersey Docks v. Gibbs*, *Mersey Docks v. Penhallow*, L. R. 1 H. L. Cas. 93.

(*q*) For instance, an action has been held to lie for omitting to repair fences, whereby plaintiff's horse strayed on to defendant's land, and was there damaged, *Lec*,

app., *Riley*, resp., 18 C. B. N. S. 722; for omitting to fence a dangerous shaft, *Williams v. Groucott*, 4 B. & S. 149; for allowing sparks to escape from a locomotive engine, and so damaging a haystack, *Jones v. Festiniog R. Co.*, L. R. 3 Q. B. 733; and for causing explosions on adjoining land to frighten away the plaintiff's game, *Ibbotson v. Peat*, 3 H. & C. 644.

of facts may be suggested. A. is the owner of a house, a portion of which is ruinous, and threatens to fall upon the contiguous building of C. A. being aware of this, demises the house to B., without himself repairing the dilapidation or requiring B. the tenant to repair it, but suffering it to continue as before. A., under such circumstances, will be liable to C. for damage caused to his premises by reason of A.'s building falling upon them (*r*), for A. was guilty of wrongful non-repair, which caused damage, and the fall of the building did not arise from an act of the lessee, but happened in obedience merely to the laws of nature. In a case of this sort there is no contract between A. and C., but there is a breach of duty owing by A. to C., and for the damage thence resulting, an action *ex delicto* is held to be maintainable by our law. Again, A. is the owner of premises bounded by a wall which he suffers to remain in a ruinous and dangerous condition. B., lawfully passing along a highway contiguous to the said wall, sustains hurt by its falling upon him. B. will have a right of action against A. to recover damages compensatory for the hurt which has been done him (*s*). Under these circumstances there is to be found no semblance of a contract, nor any connection or privity between A. and B.; the right of action contains in truth exclusively these elements—a general breach of duty on the part of A., and damage suffered by B. in consequence of such breach of duty.

We will in the next place enumerate and briefly consider the wrongs that may be done to personal property as well by unlawfully taking, detaining, or converting it, as by injuring or causing consequential damage to it.

Unlawful
taking.

The right of property in external things being originally acquired by occupancy, and preserved and transferred by grants, deeds, and wills, in continuation of that occupancy; it follows as a necessary consequence, that when

(*r*) *Todd v. Flight*, 9 C. B N. S. 377.

(*s*) *Duckworth v. Johnson*, 4 H. & N. 655.

I once have gained a rightful possession of any goods or chattels, either by a just occupancy or by a legal transfer, whoever by force dispossesses me of them, is guilty of a transgression against the law of society, which is a kind of secondary law of nature. For there must be an end of all social commerce between man and man, unless private possessions be secured from unjust invasion: and, if an acquisition of goods by force were allowed to be a sufficient title, all property would soon be confined to the most strong, or the most cunning; and the weak and simple-minded part of mankind (which is by far the most numerous division) could never be secure of their possessions.

The wrongful taking of goods being thus clearly an injury, the next consideration is, what remedy the law of England has given for it. And this is by an action of trespass, technically described as *de bonis asportatis*, wherein the plaintiff may recover, not the thing itself, but only damages for the loss of it (*t*).

Detinue and replevin (which, being somewhat anomalous in its nature, will be separately treated of at the end of this Chapter) are the only actions in which the specific possession of personal chattels is restored to the proper owner. For things personal are looked upon by the law as of a nature so transitory and perishable, that it is for the most part impossible either to ascertain their identity, or to restore them in the same condition as when they came to the hands of the wrongful possessor. And, since it is a maxim that "*lex neminem cogit ad vana, seu impossibilia*," our law therefore contents itself in general with restoring, not the thing itself, but a pecuniary equivalent to the party injured; by giving him a satisfaction in damages.

Detinue lies for the illegal detention of another's goods, whether the original taking of them was lawful or other-

Unlawful
detainer.

(*t*) As to a taking of goods *animo furandi*, *post*, vol. iv.

wise. As if I lend a man a horse, and he afterwards refuses to restore it, this injury consists in the detaining, not in the original taking, and the regular method for me to recover possession is by action of detinue (*u*); in which action it is necessary to ascertain the thing detained, so that it may be specifically known and recovered. Therefore detinue cannot be brought for money, corn, or the like; for that cannot be known from other money or corn; unless it be in a bag or a sack, for then it may be distinguishably marked. In order therefore to ground an action of detinue, which is only for the detaining, these points are necessary (*x*): 1. That the defendant has got into possession of and wrongfully detains the plaintiff's goods; 2. That the plaintiff had at the time of commencing the action a right to the immediate possession of them; 3. That the plaintiff had a property in them (*x*); and, 4. That they be ascertained in point of identity. Upon this the jury, if they find for the plaintiff, assess the respective values of the several parcels detained, and also damages for the detention. And the judgment is conditional; that the plaintiff recover the said goods, or (if they cannot be had) their respective values, and also damages for detaining them (*y*).

A peculiar power, ancillary to the remedy by detinue, has recently been conferred upon a court of common law, the power of compelling restitution of a chattel which has been unlawfully detained—by distress, “till the defendant render such chattel,” or the power at the option of the plaintiff of “causing to be made of the defendant's goods the assessed value of such chattel” (*z*).

Conversion

The action of trover or conversion originally lay for recovery of damages against such person as had found another's goods, and refused to deliver them on demand,

(*u*) F. N. B. 138.

(*v*) Bull. & L. Pl., 2nd ed. 271.

(*x*) See *Oliver v. Oliver*, 11 C. B. N. S. 139.

(*y*) Co. Entr. 170; Chitt. Forms, 9th ed. 255.

(*z*) 17 & 18 Vict. c. 125, s. 7S. See 19 & 20 Vict. c. 97, s. 2.

but converted them to his own use ; from which finding and converting it was called an action of trover and conversion. By a fiction of law, however, an action of trover was at length permitted to be brought against any man who had in his possession by any means the personal goods of another, and wrongfully sold or used them without the consent of the owner, or asserted dominion over them or refused to deliver them when demanded. And although the fact of a finding became immaterial, the plaintiff still suggested in his declaration that he had lost such goods, and that the defendant found them : a form which has been simplified by the first Common Law Procedure Act, s. 49, which enjoins that " the statement of losing and finding and bailment in actions for goods or their value " be omitted. The declaration in trover accordingly now alleges that " the defendant converted to his own use, or wrongfully deprived the plaintiff of the use and possession " of his goods. To support this action the plaintiff must show a right of possession (*a*), and a right of property ; he must also give proof of a conversion (*b*) by the defendant. Any man may take the goods of another into possession if he finds them ; but no finder is allowed thus to acquire a property therein as against the absolute owner, and therefore he must not convert them to his own use, which the law presumes him to do if he refuses to restore them to the owner : for which reason such refusal alone is *prima facie* evidence of a conversion (*c*). A conversion being proved, the plaintiff

(*a*) See *Meyerstein v. Barber*, L. R. 2 C. P. 661.

(*b*) As to the meaning of conversion, see *Burroughes v. Bayne*, 5 H. & N. 296 ; *Pillott v. Wilkinson*, 3 H. & C. 345.

(*c*) *Armory v. Delamirie*, 1 Stra. 504, shows that the finder of a jewel, though he does not by such finding acquire in it an absolute

indefeasible property or ownership, has yet such a property in it as will entitle him to keep it as against all save the rightful owner ; and consequently it was there held that the finder might maintain trover for the jewel. In this case the evidence showed clearly that there had been a misappropriation of the jewel, and from it we gather that a special

may in this action recover damages equal to the value of the thing converted.

Injury
direct or
consequen-
tial.

As to the damage that may be done to things personal, while in the possession of the owner, as by hunting a man's deer, shooting his dogs, poisoning his cattle, or in anywise taking from the value of any of his chattels, or making them in a worse condition than before, these are wrongs too obvious to need explication. I have only therefore to mention the remedies given by the law to redress them, which are in two shapes; by action of trespass, where the act is in itself immediately injurious to another's property, and by action on the case, where the act is in itself perhaps indifferent, and the injury only consequential (*d*), in either of which suits the plaintiff may recover damages in proportion to the injury which he proves that he has sustained. And it is not material whether the damage be done by the defendant himself, or his servants by his direction; for the action will lie against the master as well as against the servant (*e*). And if a man keeps a dog which does mischief, by worrying sheep, the owner must now answer for the consequences thereof, whether he knows of such evil habit or not, for "it shall not be necessary for the party seeking such damages to show a previous mischievous propensity in such dog, or the owner's knowledge of such previous propensity, or that the injury was attributable to neglect on the part of such owner" (*f*). This statute does not however apply where hurt is caused

property in goods will, as against a wrong-doer, entitle the person having it to maintain trover. See also *Bridges v. Hawkesworth*, 21 L. J. Q. B. 75.

(*d*) See, *ex. gr.*, *Mears v. London and South West. R. C.*, 11 C. B. N. S. 850. If the pledgee of a chattel deals with the pledge in a manner other than is allowed by law for the payment of his debt, an action on the case would lie

against him for thus wrongfully disposing of the reversionary interest of the pledgor, but neither trover nor detinue would in the case supposed be maintainable, for each of these actions assumes an immediate right to possession in the plaintiff. *Halliday v. Holgate*, L. R. 3 Ex. 299; *Donald v. Suckling*, L. R. 1 Q. B. 585.

(*e*) *Noy's Max.* c. 44.

(*f*) 28 & 29 Vict. c. 60, s. 1.

to a human being by a ferocious animal, in which case the *scienter* must, where the animal is domesticated, be proved, though not so if the animal be *feræ naturæ* (g).

And here is noticeable the diversity of remedies which may sometimes present themselves for choice to one aggrieved, inasmuch as a particular ingredient essential for the maintenance of an action in one form, but not at all necessary to the maintaining of it in another, may at pleasure be discarded and put out of sight so as perchance to affect the form of action to be adopted and the evidence to be adduced on behalf of the plaintiff at the trial, and to cause a change in the mode of procedure. If a man's goods are taken by an act of trespass, and are subsequently sold by the trespasser, and the proceeds of their sale received by him, we have seen that an action of trespass will lie for this injury against the trespasser, and if minded thus to sue, the complainant will declare that "the defendant seized and took his goods and carried away the same and converted them to his own use." The gist of the complaint when thus put forward obviously is the forcible and tortious taking of the chattel, the property of the plaintiff. But in the case supposed it is quite open to him to waive the element of force, and to sue in trover for the value of the goods, charging merely that the defendant converted them to his own use; or the plaintiff may bring his action in detinue, and complain of the detention of his goods, and possibly by availing himself of this latter remedy may compel their restitution (h). Further, the plaintiff might, under the circumstances supposed, maintain an action for money received by the defendant for his use.

The procedure by replevin, which the Mirror (i) ascribes to Glanvil, chief justice to King Henry II., is specially

(g) See *Worth v. Gilling*, L. R. Q. B. 101.

2 C. P. 1; *Smith v. Great Eastern* (h) *Ante*, p. 256.

R. C., *Ib.* 4; *May v. Burdett*, 9 (i) Chap. 2, s. 6.

appropriate for contesting the validity of a distress (though it lies for the wrongful taking of goods and chattels under other circumstances (*k*)), the thing taken being redelivered to the owner, upon his giving security to try the legality of the distress, and to restore it if the right be adjudged against him. Formerly, when the party distrained upon intended to dispute the right of the distress, he had no other process at the common law than by a writ of replevin, *replegiari facias* (*l*); which issued out of chancery, commanding the sheriff to deliver the distress to the owner, and afterwards to do justice in respect of the matter in dispute in his own county court. This was, however, a tedious method of proceeding, the beasts or other goods being long detained from the owner to his great loss and damage (*m*). For which reason the statute of Marlbridge (*n*) directed that (without suing a writ out of the chancery) the sheriff immediately, upon plaint to him made, should proceed to replevy the goods. And, for the greater ease of the parties, it was further provided by statute 1 Ph. & M. c. 12, that the sheriff should appoint at least four deputies in each county, for the purpose of making replevins; and upon application either to the sheriff or one of his said deputies, security was to be given, in pursuance of the statute of Westm. 2, 13 Edw. 1, c. 2:—1. That the party replevying would pursue his action against the distrainer, for which purpose he put in *plegios de prosequendo*, or pledges to prosecute; and, 2. That if the right were determined against him, he would return the distress again, for which purpose he was also bound to find *plegios de retorno habendo*. Besides these pledges, the sufficiency of which was discretionary and at the peril of the sheriff, the statute 11 Geo. 2, c. 19, required that the officer, granting a replevin on a distress for rent, should take a bond with two sureties in a sum of

(*k*) Per Lord Redesdale in *Shannon v. Shannon*, 1 Sch. & Lef. 327;
Mellor v. Leather, 1 E. & B. 619.

(*l*) F. N. B. 68.

(*m*) 2 Inst. 139.

(*n*) 52 Hen. 3, c. 21.

double the value of the goods distrained, conditioned to prosecute the suit with effect and without delay, and for return of the goods; which bond was to be assigned to the avowant or person making cognizance, on request made to the officer; and, if forfeited, might be sued upon in the name of the assignee. The sheriff, on receiving such security, was immediately, by his officers, to cause the chattels taken in distress to be restored into the possession of the party distrained upon; who was then bound to bring his action of replevin with a view to testing the validity of the distress.

In this action the distrainer (the defendant) made avowry; that is, avowed taking the distress, and set forth the reason of it, as for rent in arrear, damage done, or other cause: or else he justified in another's right as his bailiff or servant, in which case he was said to make cognizance; that is, he acknowledged the taking, but insisted that such taking was legal, as he acted by the command of one who had a right to distrain; and on the truth and legal merits of this avowry or cognizance the cause was determined. If it were determined for the plaintiff; viz. that the distress was wrongfully taken; he kept the goods which he had already got into his own possession, and moreover recovered damages (*o*). But if the defendant prevailed by the default or nonsuit of the plaintiff, he was entitled to a writ *de retorno habendo*, whereby the goods or chattels (which had been distrained and then replevied) were returned again into his custody; to be sold or otherwise disposed of, as if no replevin had been made. In virtue, however, of the statute 17 Car. 2, c. 7, if the plaintiff were nonsuit before issue joined, then upon suggestion made on the record, or if judgment were given against him on demurrer, then, without any such suggestion, the defendant might have had a writ to inquire into the value of the distress by a jury, and might have recovered the amount of it in damages, if less than

(*o*) F. N. B. 69.

the arrear of rent; or, if more, then so much as was equal to such arrear, with costs: or, if the nonsuit were after issue joined, or if a verdict were had against the plaintiff, then the jury impaneled to try the cause were to assess such arrears for the defendant: and if (in any of these cases) the distress were insufficient to answer the arrears distrained for, the defendant might have taken a further distress.

According to the policy of our ancient law, as the end of a distress is to compel the party distrained upon to satisfy the debt or duty owing from him, this end was thought to be as well answered by the giving of sufficient sureties in the manner above mentioned as by retaining the distress, which might frequently occasion great and needless inconvenience to the owner. The soundness of this policy is still recognized, although the practice connected with replevin has, by recent statutes, been altered and improved.

Any action of replevin may now be brought in the county court (*p*), or in a superior court; the powers and responsibilities of the sheriff with respect to replevin bonds and replevins have ceased; and the registrar of the county court of the district in which any distress subject to replevin may be taken is empowered to approve of replevin bonds, to grant replevins, and to issue all necessary process in relation thereto (*q*).

If the replevisor, or person replevying goods, elect to commence proceedings in a county court, he must do so in the court of the district in which the distress was taken (*r*), and must at the time of replevying give security conditioned to commence an action of replevin against the distrainer within one month from the date of the security, to prosecute such action with effect and without delay, and to make return of the goods, if a return thereof shall be

(*p*) 19 & 20 Vict. c. 108, s. 120,
extended by 23 & 24 Vict. c. 126,
s. 22.

(*q*) 19 & 20 Vict. c. 108, ss. 63,
64.

(*r*) 9 & 10 Vict. c. 95, s. 120.

adjudged (*s*). On entering the plaint, the plaintiff will have to specify and describe, in a statement of particulars, the cattle, or the several goods and chattels taken under the distress, and of the taking of which he complains (*t*). An action of replevin commenced in the county court may, however, be thence removed by the defendant into a superior court by *certiorari*, security, to be approved of by the master, being given for such amount, not exceeding 150*l.*, as he shall think fit, the condition of such security being that the defendant will defend the action with effect, and, unless the replevisor discontinue or do not prosecute it, or become nonsuit therein, will prove before the court into which the action is removed, that he (the defendant) had good ground for believing, either that the title to some corporeal or incorporeal hereditament, or to some toll, market, fair, or franchise, was in question, or that the rent or damage in respect of which the distress was taken exceeded 20*l.* (*u*).

If the defendant in replevin, anticipating that the title to the premises in respect whereof the distress was made will really come in question on the trial in the county court, is desirous of removing the action into a superior court, he should proceed to do so in the manner above described, for otherwise the county court may entertain the case. Indeed, the county court has now jurisdiction to try any action in which the title to any corporeal or incorporeal hereditament shall come in question where neither the value of the lands, tenements, or hereditaments in dispute, nor the rent payable in respect thereof, shall exceed 20*l.* yearly, or in case of an easement or licence where neither the value nor reserved rent of the lands, tenements, or hereditaments in respect of which the easement or licence is claimed, or on, through, over, or under which such easement or licence is claimed shall exceed such sum (*x*).

(*s*) 19 & 20 Vict. c. 108, s. 66.

(*t*) Rules of 1867, reg. 260.

(*u*) 19 & 20 Vict. c. 108, s. 67.

(*x*) 30 & 31 Vict. c. 142, s. 12.

The action of replevin is tried in a summary way, either with or without a jury (*y*), as other actions are tried in the county court.

Where the distress is for rent, and the defendant succeeds in the action, if the defendant require, the judge or the jury will find the value of the goods distrained, and if the value be less than the amount of rent in arrear, judgment will be given for the amount of such value, but if the amount of the rent in arrear be less than the value so found, judgment will be given for the amount of such rent, and may be enforced in like manner as any other judgment of the court (*z*).

Where the distress is for damage-feasance, and the defendant is entitled to judgment for a return, if the plaintiff require, the judge or the jury will find the amount of the damage sustained by the defendant, and judgment will be given in favour of the defendant, in the alternative, for a return, or for the amount of the damage so found (*a*).

An appeal lies in replevin from the county court where the amount of rent or damage exceeds 20*l.* (*b*), or where the title comes in question, or, by leave of the judge, in any other case (*c*).

If the replevisor elect to commence his action in a superior court (which in such case will have power to hear and determine the same), he must, at the time of replevying, give security, to be approved of by the registrar, the condition of such security being that the party giving it will commence an action of replevin against the distrainer in the court specified within one week from the date thereof, and will prosecute such action with effect and without delay, and unless judgment therein be obtained by default, will "prove before such superior court that he had good ground for believing either that the title

(*y*) Reg. 261.

(*z*) Reg. 262.

(*a*) Reg. 263.

(*b*) 19 & 20 Vict. c. 108, s. 68;

23 & 24 Vict. c. 126, s. 22.

(*c*) 30 & 31 Vict. c. 142, s. 13.

to some corporeal or incorporeal hereditament, or to some toll, market, fair, or franchise, was in question, or that such rent or damage exceeded 20*l.*," and will make return of the goods, if a return thereof be adjudged (*d*). Should the plaintiff succeed in such action, he retains the goods replevied to him, together with small damages for their detention; whereas, if the defendant succeeds, he will be entitled to a return of the goods, and also, under the stat. 17 Car. 2, c. 7, already noticed (*e*), to his rent and costs. And thus much for replevin, which finishes our inquiries into such wrongs as may be offered to personal property, with their respective remedies by action.

(*d*) 19 & 20 Vict. c. 108, s. 65.

(*e*) *Ante*, p. 261.

CHAPTER XI.

JURISDICTION OF SUPERIOR COURTS OF LAW. WRONGS TO REAL PROPERTY.

WE have now to consider such wrongs as affect that species of property which the laws of England have denominated real; they are usually of a more substantial and permanent nature than those which affect the more transitory rights attaching to chattels personal.

Wrongs affecting real rights are principally ouster or dispossession, trespass, and nuisance. These we shall proceed to notice in the order indicated, and, as occasion may arise, will specify some other wrongs not exactly referable to any one of the foregoing heads, yet, by no means, unimportant.

Ouster, or
dispossession.

Ouster, or dispossession, is a wrong or injury that carries with it the amotion of possession: for thereby the wrong-doer gets into the actual occupation of land or realty, and obliges its rightful owner to seek his legal remedy, in order to get possession of it, and also to recover damages for the injury sustained. And here the reader will distinguish between the right of possession and the right of property in relation to land, hereditaments and tenements; for this distinction is material with a view to discerning the classification and nature of some real actions, now abolished, at which we purpose very briefly and cursorily to glance.

In the times of our Saxon ancestors, the right of possession seems only to have been recoverable by writ of

entry (*a*), which was commonly brought where the tenant, though not entitled, had entered, without fraud or tort, into possession of land, as by the deed or consent of one who himself either came into possession of such land unlawfully, or had but a particular or defeasible estate in it. This writ was termed a writ of entry because it not only spoke of the entry of the tenant, but likewise showed for what reason the possession ought not to be detained from the demandant (*b*). The possessory action thus initiated was usually brought in the county court; and we may observe that the proceedings in such an action were not then so tedious when that court was held, and process issued from it and was returnable therein at the end of every three weeks, as they became after the Conquest, when all causes were drawn into the king's courts, and process issued only from term to term; which was found exceedingly dilatory, being at least four times as slow as it had before been.

And hence a new remedy was invented in many cases, to do justice to the people, and to determine the right to the possession of land in the proper county, and by the king's judges. This was the remedy by assize, which was called by statute Westminster 2, 13 Edw. 1, c. 24, *festinum remedium*, in comparison with that by a writ of entry; it not admitting of many dilatory pleas and proceedings, to which other real actions were subject.

The writ of assize is said to have been invented by Glanvil, chief justice to Henry II. (*c*); and, if so, may have owed its introduction to the parliament held at Northampton in the twenty-second year of that prince's reign; when justices in eyre were appointed to go round the kingdom in order to take these assizes: and the assizes themselves were clearly pointed out and described (*d*). As

(*a*) Gilb. Ten. 42.

(*b*) Booth, Real Actions, 2nd ed. 172.

(*c*) Mirror, c. 2, s. 25.

(*d*) Id. s. 9. *Si dominus feodi negat hæredibus defuncti saisinam ejusdem feodi, justitiiarii domini regis faciant inde fieri recognitionem*

a writ of entry was a real action, which disproved the title of the tenant by showing the unlawful commencement of his possession; so an assize was a real action, which proved the title of the demandant merely by showing his or his ancestor's possession (*f*); and these two remedies were in other respects so much alike, that a judgment or recovery in one of them was a bar against the other; so that when a man's possession had been once established by either of these possessory actions, it could never have been disturbed by the same antagonist in any other of them.

The word assize, derived by Sir Edward Coke (*g*) from the Latin *assideo*, to sit together, signified originally, the jury who tried the cause, and sat together for that purpose. By a figure it was afterwards made to signify the court or jurisdiction, which summoned this jury together by a commission of assize, or *ad assisas capiendas*; and hence the judicial assemblies held by commission from the crown, as well to take writs of assize as to try causes at *nisi prius*, were termed in common speech the assizes. By another somewhat similar figure, the name assize was also applied to the action for recovering possession of land: for the reason, says Littleton (*h*), why such writs at the beginning were called assizes, was, that in them the sheriff was ordered to summon a jury, or assize; which was not expressed in any other original writ (*i*).

This remedy, by writ of assize, was only applicable to two species of injury by ouster, viz. abatement (*k*), and a

*per xii legales homines, qualem
saisinam defunctus inde habuit, die
quâ fuit vivus et mortuus; et, sicut
recognitum fuerit, ita hæredibus
ejus restituant. S. 10. Justitiarum
domini regis faciant fieri recogni-
tionem de dissaisinis factis super
assisam, a tempore quo dominus rex
venit in Angliam proxime post pa-*

*cem factam inter ipsum et regem
filium suum* (Spelm. Cod. 330).

(*f*) Finch, L. 284.

(*g*) 1 Inst. 153.

(*h*) S. 234.

(*i*) Co. Litt. 159.

(*k*) The term "abatement" was a figurative expression to denote that the rightful possession or free-

novel (or recent) *disseisin* (1). If the abatement happened upon the death of the demandant's father or mother, brother or sister, uncle or aunt, nephew or niece, the remedy was by an assize of *mort d'ancestor*. The writ directed the sheriff to summon a jury or assize, who were to view the land in question, and recognise whether such ancestor were seised thereof on the day of his death, and whether the demandant were the next heir: soon after which the judges came down by the king's commission to take the recognition of assize: when, if these points were found in the affirmative, the law immediately transferred the possession from the tenant to the demandant.

hold of the heir or devisee had been overthrown by the intervention of a stranger. An abatement being where a person had died seised of an inheritance, and before the heir or devisee entered, a stranger having no right of entry got possession of the freehold: this entry of him was called an abatement, and he himself was denominated an abator. Finch, L. 195.

Such abatement of a freehold was somewhat similar to an immediate occupancy in a state of nature, which is effected by taking possession of the land the same instant that the prior occupant by his death relinquishes it. But this, however agreeable to natural justice, considering man merely as an individual, is diametrically opposed to the law of society, and particularly to the law of England: which, for the preservation of public peace, has prohibited as far as possible all acquisitions by mere occupancy: and has directed that lands, on the death of the present possessor, should immediately vest either in some person, expressly named and appointed by the deceased, as his

devisee; or, on default of such appointment, in such one of his next relations as the law has selected and pointed out as his natural representative or heir. The entry therefore of a mere stranger by way of intervention between the ancestor and heir or person next entitled, which kept the heir or devisee out of possession, was regarded as one of the highest injuries to the rights of real property.

(1) Disseisin is a wrongful putting out of him who is seised of the freehold. Disseisin may be effected either in corporeal or incorporeal inheritances. Disseisin of a thing corporeal, as of a house, or land, is by entry and actual dispossession of the freehold; as if a man enters either by force or fraud into the house of another, and turns, or at least keeps him out of possession. Disseisin of an incorporeal hereditament cannot be an actual dispossession: for the subject itself is neither capable of actual bodily possession, nor dispossession; but is in general nothing more than a disturbance of the owner in the means of coming at, or enjoying it.

In an assize of *novel* (or recent) *disseisin* (*m*), as in that of *mort d'ancestor* just mentioned, the demandant's possession must have been shown. In this action a complaint was made by the demandant of the disseisin committed, in terms of direct averment; whereupon the sheriff was commanded to re seize the land and all the chattels thereon, and keep the same in his custody till the arrival of the justices of assize; and in the meantime to summon a jury to view the premises in question, and make recognition of the assize before the justices. At which time the tenant might plead either the general issue or any special plea. And if, upon the general issue, the recognitors found an actual seisin in the demandant, and his subsequent disseisin by the tenant; he had judgment to recover his seisin, and damages for the injury sustained: this being the only case in which damages were recoverable in a possessory action at the common law (*n*); the tenant being in other cases allowed to retain the intermediate profits of the land, to enable him to perform the feudal services appertaining to it; though costs and damages were annexed to many other possessory actions by the statutes of Marlbridge, 52 Hen. 3, c. 16, and of Gloucester, 6 Edw. 1, c. 1.

In these possessory actions there was a time of limitation settled, beyond which no man should avail himself of the possession of himself or his ancestors, or take advantage of the wrongful possession of his adversary. For, if he were negligent for a long and unreasonable time, the law refused afterwards to lend him any assistance, to recover the possession merely; both to punish his neglect (*nam leges vigilantibus, non dormientibus, subveniunt*), and also because it was presumed that the supposed wrongdoer had

(*m*) Which name was originally given to this proceeding, because the disseisin must have been since the last *eyre* or circuit of the justices, which happened once in seven

years, otherwise the action was gone.

(*n*) Bract. 187; Stat. Marlbr. c. 16.

in such a length of time procured a legal title, otherwise he would sooner have been sued.

By these several possessory remedies the right of possession might formerly have been restored to him who had been unjustly deprived thereof. But the right of possession (though it carries with it a strong presumption) is not always conclusive evidence of the right of property, which may subsist in another man. For, as one man may have the possession, and another the right of possession, which was recoverable by a possessory action; so one man might have had the right of possession, and so might not have been liable to eviction by any possessory action, and another might have had the right of property, which could not have been otherwise asserted than by the great and final remedy of a writ of right (*o*), or such correspondent writs as were in the nature of a writ of right.

The writ of right was in its nature the highest writ in the law (*p*), and lay only for an estate in fee-simple, and not for him who had a less estate. This writ lay concurrently with any other real action, in which an estate of fee-simple might be recovered; and also lay after it, being as it were an appeal to the mere right, when judgment had been had as to the possession in an inferior possessory action (*q*). But though a writ of right might have been brought, where the demandant was entitled to the possession, yet it rarely was advisable to bring it in such a case, since a more expeditious and easy remedy was to be had, without meddling with the property, by proving the demandant's own, or his ancestor's, possession, and an illegal ouster, in one of the possessory actions. But in case the right of possession had been lost by length of time, or by judgment against the true owner in one of these inferior suits, there was no other choice. The writ of right was

(*o*) This writ when brought by the issue in tail, or by the reversioner or remainderman after the determination of an estate tail, was called a *formedon*.
 (*p*) F. N. B. 1.
 (*q*) *Id.* 1, 5.

then the only remedy that could be had, and was of so forcible a nature, that it overcame all obstacles, and cleared all objections that might have arisen to cloud and obscure the title, for, after issue once joined in a writ of right, the judgment was absolutely final; so that a recovery had in this action might have been pleaded in bar of any other claim or demand.

The pure, proper, or mere writ of right lay only, we have said, to recover land in fee-simple, unjustly withheld from the true proprietor. But there were also some other writs which were said to be in the nature of a writ of right.

The writ of right was brought, according to circumstances, either in the court baron of the lord of whom the lands were holden, or in the king's court; and in the progress of this action the demandant alleged some seisin of the lands and tenements in himself, or else in some person under whom he claimed, and then derived the right from the person so seised to himself; to which the tenant might have answered by denying the demandant's right, and averring that he had more right to hold the lands than the demandant had to demand them: and, this right of the tenant being shown, it then put the demandant upon the proof of his title: in which, if he failed, or if the tenant had shown a better, the demandant and his heirs were perpetually barred of their claim; but if the demandant could make it appear that his right was superior to the tenant's, he recovered the land against the tenant and his heirs for ever; though even this writ of right, however superior to any other, could not have been sued out at any distance of time.

Real actions for the recovery of land having, long before the passing of the statute 3 & 4 Will. 4, c. 27, become almost entirely disused (*r*), were by section 36 of that act

(*r*) There is a modern instance of a writ of right in *Davies v. Lowndes*, 1 Bing. N. C. 597, where the form of the proceedings may be seen.

altogether abolished (*s*) ; so that the action of ejectment is now the only direct mode of procedure for trying the title to real property, although trespass is sometimes made indirectly available for that purpose.

Although the remedy by ejectment has itself been Ejectment recently much simplified, yet, inasmuch as it has become the common method of trying the title to lands or tenements, it may not be improper to delineate, with some degree of minuteness, its history, the manner of its process, and the principles whereon it is grounded.

Ejectment was originally an action brought by one who had a lease for years, to repair the injury done him by dispossession. In order, therefore, to convert it into a method of trying title to the freehold, it was first necessary that the claimant should take possession of the lands, to empower him to constitute a lessee for years, who might be capable of receiving this injury of dispossession. When, therefore, a person, having a right of entry into lands, determined to acquire that possession, which was wrongfully withheld by the tenant, he made (as by law he might) a formal entry on the premises ; and being so in the possession of the soil, he there, upon the land, sealed and delivered a lease for years to some third person or lessee : and having thus given him entry, left him in possession of the premises. This lessee was to stay upon the land, till the prior tenant, or he who had the previous possession, entered thereon afresh and ousted him ; or till some other person (either by accident or by agreement beforehand) should come upon the land, and turn him out or eject him. For this injury, when committed, the lessee became entitled to his action of ejectment against the tenant, or this "casual ejector," whichever it was that ousted him, to recover back his term and damages. But where this action was brought against such a casual

(*s*) The writs of dower *unde nihil habet*, and right of dower, however,

ejector as just mentioned, and not against the very tenant in possession, the court would not suffer the tenant to lose his possession without any opportunity to defend it. Wherefore it was a standing rule, that no plaintiff should proceed in ejectment to recover lands against a casual ejector, without notice given to the tenant in possession (if any there were), and making him a defendant if he pleased. And, in order to maintain the action, it was requisite for the plaintiff, in case of any defence being set up, to make out four points before the court; viz., title, lease, entry, and ouster. First, he must have shown a good title in his lessor, which brought the matter of right entirely before the court; then, that the lessor, being seised or possessed by virtue of such title, did make him the lease for the present term; thirdly, that he, the lessee or plaintiff, did enter or take possession in consequence of such lease; and then, lastly, that the defendant ousted or ejected him. On proof whereof the plaintiff had judgment to recover his term and damages; and might, in consequence, have had a writ of possession, which the sheriff executed by delivering to him the undisturbed and peaceable possession of his term.

Such was the regular mode of bringing an action of ejectment; but, as much trouble and formality were found to attend the actual making of the lease, entry, and ouster, a more easy method of trying a title by ejectment, where there was an actual tenant or occupier of the premises in dispute, was invented by the Lord Chief Justice Rolle (*t*), who sat in the court of upper bench (*u*) during the exile of King Charles II. This new method entirely depended upon a string of legal fictions; no actual lease was made, there was no actual entry by the plaintiff, nor actual ouster by the defendant; but these were merely ideal, for the sole purpose of trying the title. To this end, in the proceedings a lease for a term of years was stated to have

(*t*) Styl. Prac. Reg. 108 (edit. 1657). (*u*) *Ante*, p. 113 (*i*).

been made, by him who claimed title, to the plaintiff who brought the action, as by John Rogers to Richard Smith, it was also stated that Smith the lessee entered; and that the defendant William Stiles, who was called the casual ejector, ousted him; for which ouster he brought the action. As soon as this action had been brought, and the complaint had been fully stated in the declaration, Stiles, the casual ejector, or defendant, sent a written notice to the tenant in possession of the lands, as George Saunders, informing him of the action brought by Richard Smith, and transmitting him a copy of the declaration: withal assuring him that he, Stiles the defendant, had no title at all to the premises, and should make no defence; and therefore advising the tenant to appear in court and defend his own title: otherwise he, the casual ejector, would suffer judgment to be had against him, and thereby the actual tenant Saunders would be turned out of possession. On receipt of this friendly caution, if the tenant in possession did not within a limited time apply to the court to be admitted a defendant in the stead of Stiles, he was supposed to have no right at all; and, upon judgment being had against Stiles the casual ejector, Saunders the real tenant would have been turned out of possession by the sheriff.

But, if the tenant in possession applied to be made a defendant, it was allowed him upon this condition; that he should enter into a rule of court to confess, at the trial of the cause, three of the four requisites for the maintenance of the plaintiff's action; viz., the lease of Rogers the lessor, the entry of Smith the plaintiff, and his ouster by Saunders himself, now made the defendant instead of Stiles: which requisites being wholly fictitious, had the defendant put the plaintiff to prove them, he must of course have been nonsuited for want of evidence; but by such stipulated confession of lease, entry, and ouster, the trial proceeded upon the merits of the title only. This done, the declaration was altered by inserting the name of George Saunders

instead of William Stiles, and the cause went to trial under the name of Smith (the plaintiff), on the demise of Rogers (the lessor), against Saunders, the new defendant. And therein the lessor of the plaintiff was bound to make out a clear title, otherwise his fictitious lessee could not have obtained judgment to have possession of the land for the term supposed to have been granted. But, if the lessor made out his title in a satisfactory manner, then judgment and a writ of possession went for Richard Smith the nominal plaintiff, who by this trial had proved the right of John Rogers, his supposed lessor. Yet, to prevent the fraudulent recovery of the possession of land, by collusion with the tenant thereof, a tenant was obliged, by a provision (*x*) (now repealed (*y*)) of the stat. 11 Geo. 2, c. 19, on pain of forfeiting three years' rent, to give notice to his landlord, when served with any declaration in ejectment: and the landlord might, by leave of the court, have been made a co-defendant to the action, in case the tenant himself appeared to it (*z*); or, if he made default, though judgment must then have been signed against the casual ejector, yet execution would have been stayed in case the landlord applied to be made a defendant, and entered into the common rule; a right which indeed the landlord had long before the provision of this statute (*a*). But, if the new defendants, whether landlord or tenant, or both, after entering into the common rule, failed to appear at the trial, and to confess lease, entry, and ouster, the plaintiff, Smith, must indeed have been there nonsuited, for want of proving those requisites (*b*); but judgment would nevertheless in the end have been entered against the casual ejector Stiles; for the condition on which Saunders, or his landlord, was admitted a defendant had been broken, and

(*x*) S. 12.

(*y*) See 30 & 31 Vict. c. 59.

(*z*) 11 Geo. 2, c. 19, s. 13, repealed *ut supra*.

(*a*) Styl. Pract. Reg. 108, 111,

265.

(*b*) An exception to this was created in favour of landlords by the repealed provision 1 Geo. 4, c. 87, s. 2.

therefore the plaintiff was put again in the same situation as if he never had appeared at all; in consequence of which (as we have seen) judgment would have been entered for the plaintiff, and the sheriff, by virtue of a writ for that purpose, would have turned out Saunders, and delivered possession to Smith.

In order to complete the remedy by ejectment, an action of trespass lay, after a recovery therein, for the mesne profits which the tenant in possession had wrongfully received.

The procedure in ejectment has, by the Common Law Procedure Act, 1852, been much simplified and improved. Under the provisions of this statute (*c*) the action now commences by a writ—directed to the persons in possession of the premises sought to be recovered by name, and generally to “all persons intitled to defend the possession” of the property claimed—which is required to be described with reasonable certainty in the writ.

The writ of ejectment (*d*) commands the parties to whom it is directed, or such of them as deny the alleged title of the claimant, within a certain period, viz., sixteen days, after service of the writ to appear in court, to defend either for the whole or for part of the premises in question; the writ further notifies to the defendant (if there be only one), that in default of putting in an appearance judgment may be signed, and he may be turned out of possession. This writ must be indorsed with the address of the attorney issuing it, or (if it were issued by the plaintiff in person) of the plaintiff. It remains in force for three calendar months, and must be served upon the person in possession of the premises (*e*). Should such person, however, hold as

(*c*) Ss. 168—221.

(*d*) See the form of this writ, C. L. Proc. Act, 1852, Sched. B., No. 13.

(*e*) In the case of what is called

a “vacant possession,” i. e. where the premises are wholly deserted and void, the writ must be served “by posting a copy thereof upon the door of the dwelling-house or

tenant merely, he must, under a penalty of forfeiting the value of three years' improved or rack rent of such premises, forthwith give notice that he has been so served to his landlord. When notice has been thus given, the landlord will, by leave of the court or a judge, be allowed to appear and defend on filing an affidavit showing that he is in possession of the land in question either by himself or his tenant (*f*), and on entering an appearance the landlord will have to state expressly that he appears as landlord, in which case he will be at liberty to set up any available and suitable defence to the action.

If, when an appearance has been entered in an action of ejectment, the claimant suffers the time ordinarily allowed for going to trial after issue joined (*g*) to elapse, the defendant in ejectment may give twenty days' notice to the claimant to proceed to trial at the sittings or assizes next after the expiration of the notice, and if the claimant neglects to proceed to trial in pursuance of such notice, and the time for going to trial be not extended by the court or a judge, the defendant may sign judgment and recover the costs of his defence (*h*).

Assuming that the tenant in possession appears to the action within the time appointed (*i*), the issue may at once be made up without any pleadings (*k*); particulars of the claim and defence, if any, being annexed to the record by the claimant (*l*). The trial upon the issue raised between

other conspicuous part of the property" sought to be recovered; s. 170.

As to the ordinary service of a writ, *post*, chap. xii.

(*f*) S. 172. By sect. 176 of the Act, the court or a judge has power "to strike out or confine appearances and defences set up by persons not in possession by themselves or their tenants."

(*g*) *Post*, Chap. xii.

(*h*) S. 202.

(*i*) S. 171.

(*k*) S. 178. As there is no plea (save to the jurisdiction) in ejectment, it follows that an equitable defence under the C. L. Proc. Act, 1854, s. 83, is not pleadable in such action: *Ncave v. Avery*, 16 C. B. 328. By "consent of the parties, and by leave of a judge, a special case may be stated, according to the practice heretofore used" (s. 179).

(*l*) S. 180.

the parties will then take place in the same manner as in other actions (*m*); and the question to be tried and decided between the claimant of the land and the defendant will be "whether the statement in the writ of the title of the claimant is true or false, and, if true," and there be several claimants, "then which of the claimants is entitled, and whether to the whole or part, and if to part, then to which part of the property in question" (*n*). Moreover, it is competent to any one in possession of land actually or constructively to come in and defend his possession, and to contest the title to be put forward at the trial by the plaintiff, either altogether, or as regards a part only of the premises mentioned in the writ (*o*), and the issue will be restricted accordingly.

If at the trial the defendant appears, and the claimant does not appear, the claimant will be nonsuited—if the claimant appears, and the defendant does not appear, the claimant will be entitled to recover without any proof of his title (*p*). Further, if the title of the claimant shall appear to have existed as alleged in the writ, and at the time of service thereof, but it shall also appear to have expired before the time of trial, the claimant will notwithstanding be entitled to a verdict according to the fact that he was so entitled at the time of bringing the action and serving the writ, and to a judgment for his costs of suit (*q*). If the jury find for the claimant, judgment may then be signed (*r*), and execution may issue for recovery of possession of the property, or such part thereof as the jury shall find the claimant entitled to, and for costs of the suit (*s*).

As regards the mode of recovering the mesne profits

(*m*) S. 180; *post*, Chap. xii.

(*n*) S. 180.

(*o*) S. 174.

(*p*) S. 183.

(*q*) S. 181.

(*r*) S. 185.

(*s*) If, however, the verdict be for the defendant, judgment may be signed and execution may issue for costs against the claimant, s. 186.

under the improved procedure:—In a case not arising between landlord and tenant after judgment has been obtained in the action of ejectment, a separate action of trespass for mesne profits must be brought. Where, however, the ejectment is by a landlord against his tenant after a forfeiture or otherwise, the claimant may at the trial (after proof that the defendant was served with notice of trial, and after proof likewise by the plaintiff of his right to recover possession of the whole or part of the demised premises) go into evidence of the mesne profits received down to the time of the verdict, and may recover damages in respect thereof (*t*).

Ejectment is a possessory action founded upon a right of entry in the party claiming title, and will in general lie for any real property on which an entry may be made and of which possession may be delivered by the sheriff. In this action the plaintiff must recover on the strength of his own title—not on the weakness of that of the defendant; mere possession, therefore, will give the defendant a *prima facie* right to the land in question (*u*). “In truth and substance,” as long since judicially observed (*x*), “a judgment in ejectment is a recovery of the possession (not of the seisin or freehold) without prejudice to the right, as it may hereafter appear even between the parties.” With a view, however, to repressing vexatious litigation which might ensue if the above doctrine were unreservedly applied, it is now provided that the claimant in a second ejectment, brought for the same premises against the same defendant, may by the court or a judge be ordered to give security for costs, with a stay of proceedings until such security shall have been given (*y*).

Ejectment, as will appear in the concluding chapter of

(*t*) S. 214.

d. *Atkyns v. Horde*, 1 Burr. 114,

(*u*) Selw. Ni. Pri. 12th ed. ii.

C. L. Proc. Act, 1852, s. 207.

696, 704.

(*y*) C. L. Proc. Act, 1854, s. 93.

(*x*) *Per* Lord Mansfield, *Taylor*

this Volume, may, subject to restrictions as regards the value of the property sought to be recovered, be brought in the county court; and possession of premises may under certain circumstances be summarily obtained either there or by magisterial intervention, as will be hereafter mentioned.

The next species of injury to be noticed affecting a man's ^{Trespass.} lands, tenements, or hereditaments is trespass. Trespass, in its largest and most extensive sense, signifies any transgression or offence against the law of nature, of society, or of the country in which we live; whether it relates to a man's person or his property. Therefore beating another is a trespass (*z*); taking a man's goods is a trespass (*a*); for which an action of trespass is given by the law: and, in general, any forcible act of one man whereby another is directly injured, is a transgression or trespass in its largest sense, for which an action of trespass will lie.

But in the limited and confined sense, in which we are at present to consider it, trespass signifies no more than an entry on another man's ground without a lawful authority, or doing some direct damage, however inconsiderable, to his real property. For the right of *meum* and *tuum*, or property in land, being once established, it follows as a necessary consequence, that this right must be exclusive; that is, that the owner may retain to himself the sole use and occupation of his soil: every entry therefore thereon without the owner's leave, and especially if contrary to his express order, is a trespass or transgression. The Roman law seems to have made a direct prohibition necessary, in order to constitute this injury: *qui alienum fundum ingreditur, potest a domino, si is praverideret, prohiberi ne ingrediatur*" (*b*). But the law of England, justly considering that serious inconvenience may happen to the owner, before he has an opportunity to forbid the entry, has carried the point much further, and

(*z*) *Ante*, p. 128.

(*b*) *Inst.* 2, 1, 12.

(*a*) *Ante*, p. 255.

has treated every entry upon another's land (unless by the owner's leave, or in some very particular cases), as an injury or wrong, for satisfaction of which an action of trespass will lie; though a jury in determining the proper *quantum* of that satisfaction, will consider how far the offence was wilful or inadvertent, and will estimate the value of the actual damage sustained.

Every unwarrantable entry on another's soil the law entitles a trespass by "breaking his close:" the words of the old writ of trespass commanding the defendant to show cause *quare clausum querentis fregit*. For every man's land is, in the eye of the law, enclosed and set apart from his neighbour's: and that either by a visible and material fence, as one field is divided from another by a hedge; or by an ideal invisible boundary, existing only in the contemplation of law, as when one man's land adjoins another's in the same field. And every such entry or breach of a man's close carries necessarily along with it some damage, as the treading down and bruising his herbage (*c*).

A person must have actual possession of land to be able to maintain such an action of trespass; or at least, it is requisite that he have a possession of the vesture and herbage of the land (*d*). Thus if a meadow be divided annually among the parishioners by lot, then after each person's several portion is allotted, he may be capable of maintaining an action for the breach of his close (*e*): for he has an exclusive interest therein for the time. But

(*c*) F. N. B. 87, 88.

(*d*) Dyer, 285; 2 Roll. Abr. 549.

Trespass will also lie by one entitled to a grant of underwood (Cro. Eliz. 413; Moor, 355, pl. 488), to an exclusive right of digging turves (*Wilson v. Mackreth*, 3 Burr. 1824), or to the exclusive enjoyment of a crop growing on the land (*Crosby v. Wadsworth*, 6 East, 602). And

where the trespass is committed by a stranger, he may be sued by one who has a mere possession, whether founded on a good title or not. (*Matson v. Cook*, 4 Bing. N. C. 392; *Holmes v. Newlands*, 11 Ad. & E. 52.)

(*e*) *Welden v. Bridgewater*, Cro. Eliz. 421.

before entry and actual possession, a person cannot maintain an action of trespass, though he has the freehold in law (*f*). And therefore an heir before entry upon land cannot have this action, though a disseisee might have it against the disseisor, for the injury done by the disseisin itself, at which time the plaintiff was seised of the land : and the customary heir of a copyholder may after entry sue for trespasses which had been committed previously thereto, for after entry his title relates back (*g*).

A man is answerable for not only his own trespass, but that of his cattle also : for, if by his negligent keeping they stray upon the land of another (and much more if he permits or drives them on), and they there tread down his neighbour's herbage, and spoil his corn or his trees, this is a trespass for which the owner must answer in damages, and the law gives the party injured a double remedy in this case ; by permitting him to distrain the cattle thus damage-feasant, or doing damage, till the owner shall make him satisfaction : or else by leaving him to the common remedy *in foro contentioso*, by action. Indeed, an action lies in either of these cases of trespass committed upon another's land either by a man himself or his cattle ; wherein a man was according to the ancient form called upon to answer, *quare vi et armis clausum ipsius A. apud B. fregit, et blada ipsius A. ad valentiam centum solidorum ibidem nuper crescentia cum quibusdam averiis depastus fuit, conculcavit, et consumpsit, &c.* (*h*) : for the law has always coupled the idea of force with that of intrusion upon the property of another. And in the action supposed if any unwarrantable act of the defendant or his beasts in coming upon the land be proved, it is an act of trespass for which the plaintiff must recover some damages, such as the jury shall think proper to assess (*i*).

(*f*) 2 Roll. Abr. 553.

(*h*) Registr. 94.

(*g*) *Barnett v. Earl of Guildford*,
11 Exch. 19.

(*i*) As to the liability of the
owner of a dog in trespass for its

In some cases trespass is justifiable; or rather entry on another's land or into his house shall not be accounted trespass: as if a man comes thither to demand or pay money, there payable; or to execute, in a legal manner, the process of the law. Also a man may justify entering into an inn or public-house, without the leave of the owner first specially asked; because when a man professes to keep such inn or public-house, he thereby gives a general licence to any person properly conducting himself to enter his doors. So a landlord may justify entering to distrain for rent; a commoner to attend his cattle, commoning on another's land; and a reversioner, to see if any waste be committed on the estate (*k*). Where, however, a man having lawfully entered on the property of another misdemeans himself, or makes an ill use of the authority with which the law has entrusted him, he shall be accounted a trespasser *ab initio* (*l*): as if one comes into a tavern and will not go out in a reasonable time, but tarries there all night contrary to the inclinations of the owner; this wrongful act will affect and have relation back even to his first entry, and make the whole a trespass (*m*). But a bare non-feasance, as not paying for the wine he calls for, will not make him a trespasser: for this is only a breach of con-

unauthorised entry on to the land of another, see *Read v. Edwards*, 17 C. B. N. S. 245.

(*k*) There is no right, however, to enter on the land of another for the purpose of gleanings there: *Steel v. Houghton*, 1 H. Bla. 51.

As to hunting, in *Earl of Essex v. Capel*, cited, Chitty, Game Laws, 2nd ed. 31, Lord Ellenborough said, "these pleasures are to be taken only when there is the consent of those who are likely to be injured by them, but they must be necessarily subservient to the consent of others. There may be such a pub-

lic nuisance by a noxious animal as may justify the running him to his earth, but then you cannot justify the digging for him afterwards; that has been ascertained and settled to be law: but even if an animal may be pursued with dogs, it does not follow that fifty or sixty people have therefore a right to follow the dogs, and trespass on other people's lands." See, also, *Hume v. Oldacre*, 1 Stark. 351.

(*l*) *The Six Carpenters' Case*, 8 Rep. 146a.

(*m*) 2 Roll. Abr. 561.

tract, for which the taverner may have an action of debt against him (*n*). So if a reversioner, who enters on presence of seeing waste, breaks the house, or stays there all night; or if the commoner who comes to tend his cattle, cuts down a tree; in these and similar cases, the law judges that he entered for this unlawful purpose, and therefore, as the act which demonstrates such his purpose is a trespass, he shall be esteemed a trespasser *ab initio* (*o*).

A man may also justify in an action of trespass, on account of the freehold, and right of entry upon the land being in himself; and as such a defence brings the title of the estate in question, this is one of the ways devised, since the abolition of real actions, for trying the property to an estate; though it is not so usual as that by ejectment. Ejectment, being a mixed action, not only gives damages for the ejection, but also possession of the land; whereas in trespass, which is merely a personal action, nothing can be recovered but damages for the wrong committed (*p*).

Another injury to a man's lands and tenements, may be Nuisance. by nuisance. Nuisance, *nocumentum*, or annoyance, signifies any thing that works hurt, inconvenience, or damage. And nuisances are of two kinds: a public or common nuisance, which affects the public, and is an annoyance to all the queen's subjects: for which reason we must refer

(*n*) *The Six Carpenters' Case*, *supra*.

(*o*) 8 Rep. 146.

See Leg. Max., 4th ed., pp. 296, *et seq.*, where many other cases illustrating the text are cited.

(*p*) The questions—whether an action of trespass to land was brought for the purpose of trying a right, and whether the trespass was wilful and malicious may be very material as regards the costs.

See stat. 3 & 4 Vict. c. 24, s. 2, which enacts that if the plaintiff, in an action of trespass, or on the

case, shall recover by the verdict of a jury less damages than forty shillings, he shall not be entitled to any costs whatever, unless the judge or presiding officer before whom the verdict is obtained, shall immediately afterwards certify on the back of the record, that the action was brought to try a right, besides the mere right to recover damages for the trespass or grievance complained of, or that the trespass or grievance was wilful and malicious. See, also, *id.* s. 3; 30 & 31 Vict. c. 142, s. 5; 8 & 9 Will. 3, c. 11, s. 3.

it to the class of public wrongs (*q*) : and a private nuisance, which is for our present consideration. We proceed, therefore, to mark out the several kinds of nuisances, and their ordinary remedies.

In discussing the several kinds of nuisances, we will consider, I. Such nuisances as may affect a man's corporeal, and II. Those which may damage his incorporeal hereditaments.

I. To corporeal hereditaments.

I. If a man builds a house so close to mine that his roof overhangs my roof, and throws the water off his roof upon mine, this is a nuisance, for which an action will lie, even without proof of special damage (*r*). We have seen, likewise, in our preceding Volume, that to erect a house or other building so near to mine, that it obstructs my ancient lights and windows, is a nuisance ; though if the windows be ancient, that is, have not subsisted for so long a time without interruption as to give a prescriptive right, and there be no covenant or contract affecting the matter, there is no injury done. For my neighbour is as much entitled to build a new edifice upon his ground as I am upon mine ; since every man may erect what he pleases upon the upright or perpendicular of his own soil, so as not to prejudice what has long been enjoyed by another ; and it was my folly to build so near another's ground as to run the risk of being thus incommoded. And depriving one of a mere matter of pleasure, as of a fine prospect by building a wall, or the like ; this, as it abridges nothing really convenient or necessary, is no injury to the sufferer, and is therefore not an actionable nuisance (*s*).

If we define a private nuisance, such as here under notice, to be any thing done to the hurt or annoyance of the lands, tenements, or hereditaments of another (*t*), the jury, on the trial of an action for nuisance, will have to determine whether the act complained of did cause annoy-

(*q*) *Post*, vol. iv.

(*r*) *Fay v. Prentice*, 1 C. B. 828.

(*s*) *Aldred's Case*, 9 Rep. 58.

(*t*) *Finch*, L. 188.

ance, in a substantial degree, to the complainant ; they will not have to consider merely whether the act complained of was done in a place convenient for the purpose (*u*). And whenever, taking all the circumstances into consideration, including the nature and extent of the plaintiff's enjoyment before the acts complained of had occurred, the annoyance is sufficiently great to amount to a nuisance at law, according to the idea above given of it, an action will lie against the person who caused or erected the nuisance, whatever the locality may be (*x*). If a person keeps his hogs, or other noisome animals, so near the house of another, that the stench of them incommodes him and makes the air unwholesome, this may be a nuisance, inasmuch as it tends to deprive him of the use and benefit of his house (*y*). A like injury may be, if one's neighbour sets up and exercises any offensive trade ; as a tanner's, a tallow-chandler's, or the like ; for though these are lawful and necessary trades, yet they should be exercised in subservience to the rule, "*sic utere tuo, ut alienum non ledas*" (*z*).

On the one hand, it has long been settled that a man may, without being liable to an action, exercise a lawful trade, as that of a butcher, a brewer, or the like, notwithstanding it be carried on so near the house of another as to be an annoyance to him in rendering his residence there less delectable or agreeable, provided the trade be so conducted that it does not cause what amounts, in point of law, to a nuisance to the neighbouring house (*a*).

On the other hand, it is clear that a person using a limekiln, or other works, which emit noxious vapours, is not justifiable in doing an actionable injury to another ; and that any place where such an operation is carried on, so that it does occasion an actionable injury to another, is

(*u*) *Carcy v. Ledbitter*, 13 C. B. N. S. 470.

(*y*) *Aldred's Case*, 9 Rep. 59.

(*z*) *Leg. Max.*, 4th ed., p. 357.

(*x*) *Bamford v. Turnley*, 3 B. & S. 62.

(*a*) *Bamford v. Turnley*, 3 B. & S. 62.

not, in the meaning of the law, a convenient place in which to carry on the business (*b*). Further, if a man erects smelting-works for lead so near the land of another, that the vapour and smoke kill his corn and grass, and damage his cattle therein, this will be held to constitute a nuisance (*c*). And, generally, if one does any such act, in itself lawful, which yet being done in that place necessarily tends to the damage of another's property, it is a nuisance: and it is incumbent on the person carrying on such a noxious business to find some other place in which to do that act, where it will be less offensive.

Here, however, a distinction should be noticed between an action brought for a nuisance upon the ground that it produces material damage to property, and an action brought for a nuisance upon the ground that the thing alleged to be a nuisance is productive of personal discomfort; an answer to the question whether that which interferes with one's personal convenience and enjoyment or quiet, which discomposes or injuriously affects one's senses or nerves, may be denominated a nuisance, will depend greatly on the circumstance where the thing complained of actually occurs. If a man lives in a town, of necessity he should subject himself to the consequences of those operations of business which may be carried on in his immediate locality, and are necessary for trade and commerce, also for the enjoyment of property and for the benefit of the inhabitants of the town and of the public at large. If a man lives in a street where there are numerous shops, and a shop is opened next door to him which is carried on in a fair and reasonable way, he has no ground for complaint because to himself individually there may arise much discomfort from the trade carried on in that shop. But when a business is carried on by one person in the neighbourhood of another, and the result of that business is a material injury, there arises a different con-

(*b*) *Per* Mellor, J., adopted by 652.

Lord Cranworth, 11 H. L. Cas. (c) 1 Roll. Abr. 89.

sideration; and the above rule as to the submission which is required from persons living in society to that amount of discomfort which may be necessary for the legitimate and free exercise of the trade of their neighbours would not apply under circumstances the immediate result of which is sensible damage to the value of the property (*d*).

Nuisances are of course almost infinitely dissimilar in kind; thus an excavation made by a landowner on his own premises and left unfenced so very near to a highway or public path as to be dangerous, may constitute a nuisance, and under such circumstances the landowner may be liable at suit of one who, passing lawfully along the public way, inadvertently oversteps its boundary and falls into the hole (*e*). So it may be a nuisance to stop or divert water which has been accustomed to run to another's meadow or mill; to corrupt or poison a water-course, by erecting a dye-house or a lime-pit for the use of trade, in the upper part of the stream, or in short to do any act therein, that in its consequences must necessarily tend to the prejudice of one's neighbour (*f*). So closely does the law of England enforce that excellent rule of gospel-morality, of "doing to others, as we would that they should do unto ourselves."

Not only a nuisance but a breach of duty causing damage to real property will be actionable; as if my neighbour, who ought to scour a ditch, does not, whereby my land is overflowed, this is an actionable nuisance (*g*). So if a person for his own purposes brings upon his land, and collects and keeps there some material such as water, likely, unless kept under control and within strict limits, to do mischief, the person who collects the water must keep it in at his peril, and if it escapes is *primâ facie* answerable for damage which may be the natural conse-

(*d*) *Per* Lord Westbury, C., *St. Hadley v. Taylor*, L. R. 1 C. P. 53.
Hclens Smelting Co. v. Tipping, 11

H. L. Cas. 642.

(*f*) *Ante*, vol. ii.

(*e*) *Barnes v. Ward*, 9 C. B. 392;

(*g*) *Hale on F. N. B.* 427.

quence of its escape. The party on whom this obligation is imposed can only excuse himself by showing that the escape was owing to the default of the complainant, or perhaps by showing that it was the consequence of *vis major* or of the act of God (*h*). And if a man so negligently constructs a hay-rick upon the extremity of his land that, in consequence of its spontaneous ignition, his neighbour's house is burnt, he may be liable to be sued for breach of duty (*i*).

Remedy for
nuisance.

Let us next consider the remedies which the law has allowed for this injury of nuisance. And here I must premise that the law gives no private remedy for anything but a private wrong. Therefore no action lies for a public nuisance, but an indictment only: because, the damage being common to all the queen's subjects, no one can assign his particular proportion of it; or, if he could, it would be extremely hard if every subject in the kingdom were allowed to harass the offender with a separate action. For this reason, no person, natural or corporate, can have an action for a public nuisance; but only the queen in her public capacity can punish the misdemeanant. Yet this rule admits of one exception; where a private person suffers some extraordinary damage, beyond the rest of the queen's subjects, by a public nuisance; in which case he shall have a private satisfaction by action. As if, by means of a ditch dug across a public way, a man or his horse sustain any damage by falling therein; for this particular damage, which is not common to others, the party shall have his action (*k*). But a bookseller, who, having a shop by the side of a public thoroughfare, suffers a temporary loss in his business in consequence of passengers being diverted from it by an obstruction wrongfully erected or maintained therein, cannot recover for such damage (*l*).

(*h*) *Rylands v. Fletcher*, L. R. 3
H. L. Cas. 330.

(*i*) *Vaughan v. Menlove*, 3 Bing.
N. C. 468.

(*k*) Co. Litt. 56.

(*l*) *Ricket v. Metropolitan R. C.*,
L. R. 2 H. L. 175.

And a reversioner may sue for damage caused to his reversionary interest by a nuisance (*m*). Such an action is on the case, and in it an injunction may be claimed against the repetition or continuance of the injury, or the committal of any injury of a like kind relating to the same property or right (*n*).

An action for nuisance will not, however, lie, unless evidence be given of damage resulting from the nuisance, and it may occasionally be necessary for the pleader by a somewhat careful scrutiny to satisfy himself that damage has really been sustained by one complaining of such an injury—that what is put forward and relied upon as damage is not illusory merely, and inappreciable, but is susceptible of proof (*o*).

Another remedy sometimes allowed by law to one aggrieved by a nuisance is, the abatement or removal of it by his own act (*p*). But if a man has abated, or removed, a nuisance which offended him, in this case he is entitled to no action (*q*). For he had choice of two remedies; either without suit, by abating it himself, by his own mere act and authority; or by suit, in which he may both recover damages, and remove it by the aid of the law: and, having made his election of one remedy, he is totally precluded from the other. Moreover, if there be two ways of abating a nuisance, the person abating it must choose the less mischievous of the two (*r*).

Another species of injury, that may be offered to real ^{Waste.} property, is by waste, or destruction in lands and tenements. This has been already (*s*) considered, and I shall here only observe, that waste is a spoil and destruction of

(*m*) *Cox v. Glue*, 5 C. B. 533. *Metropolitan R. C.*, L. R. 2 H. L. 175.
See *Simpson v. Savage*, 1 C. B. N. S. 347.

(*n*) 17 & 18 Vict. c. 125, s. 79.

(*o*) *Smith v. Thackerah*, L. R. 1, C. P. 564; *Winterbottom v. Lord Derby*, L. R. 2 Ex. 316; *Ricket v.*

(*p*) *Ante*, p. 5.

(*q*) *Baten's Case*, 9 Rep. 55 a.

(*r*) *Roberts v. Rose*, L. R. 1 Ex. 82, 89.

(*s*) *Ante*, vol. ii.

the estate either in houses, woods, or lands; by demolishing not the temporary profits from them only, but the very substance of the thing; thereby rendering it wild and desolate; which the common law expresses significantly by the word *vastum*; and that this *vastum*, or waste, is either voluntary or permissive; the one by an actual demolition of the lands, woods, and houses; the other arising from mere omission, negligence, and want of sufficient care in making reparations, suffering the property to fall into decay, and the like. So that my only business is at present to show, to whom this waste may be an injury at law; and who is entitled to any, and what, remedy in respect of it by action.

The persons who may be injured by waste, are such as have some interest in the estate wasted; if, indeed, a man be the absolute tenant of land in fee simple, without any incumbrance or charge on the premises, or if he be tenant in tail, without impeachment of waste, he may commit whatever waste his own indiscretion may prompt him to, without being impeachable, or accountable for it to any one. And, though his heir or the next tenant in tail is sure to be the sufferer, yet, in either of the cases mentioned, the person who possesses and enjoys the property may treat it as he likes, and cannot be called to account for so doing by the party who may be afterwards entitled to it. The nonliability of the tenant in fee simple results, indeed, from the well-known maxim, *nemo est hæres viventis*; no man is sure of succeeding him, as well on account of the uncertainty which shall die first, as also because the tenant in fee has it in his own power to constitute what heir he pleases, according to the civil law notion of a *hæres natus* and a *hæres factus*: or, in the more accurate phraseology of our English law, he may aliene or devise his estate to whomever he thinks proper, and by such alienation or devise may disinherit his heir at law. Into whose hands soever therefore the estate wasted comes, after a tenancy in fee-simple, though the waste is undoubtedly

damnum, it is, in legal contemplation, *damnum absque injuriâ*, and no action will lie for it. A tenant in tail, without impeachment of waste, holding, as is said, *per formam doni*, is not liable, if he commit it, by the express words of the limitation under which he holds. The most effectual remedy for restraining waste is, as already shown, afforded by a court of equity; but in general an action on the case in which an injunction may be claimed (*t*) will lie for it at law.

One species of interest, which may be injured by waste, is that of a person who has a right of common in the place wasted; especially if it be common of estovers, or a right of cutting and carrying away wood for house-bote, plough-bote, &c. Here, if the owner of the wood demolishes the whole wood, and thereby destroys all possibility of taking estovers, this is an injury to the commoner, amounting to no less than a disseisin of his common of estovers, if he chooses so to consider it; for which he may have his remedy by an action on the case.

But the interest in land most material, and most often prejudiced by the commission of waste, is that of the remainder-man or reversioner after a particular estate in being. Here, if the particular tenant (be it the tenant in dower or by curtesy, who was answerable for waste at the common law (*u*), or the lessee for life or years, who was first made liable by the Statutes of Marlbridge (*x*) and of Gloucester (*y*)), if the particular tenant, I say, commits or suffers any waste, it is a manifest injury to him who has the inheritance, as it tends to mangle and dismember it of its most desirable incidents and ornaments, among which timber and houses may justly be reckoned the principal. To him therefore in remainder or reversion, to whom the inheritance appertains in expectancy (*z*), our ancient law

(*t*) 17 & 18 Vict. c. 125, s. 79.

(*u*) 2 Inst. 299.

(*x*) 52 Hen. 3, c. 23.

(*y*) 6 Edw. 1, c. 5.

(*z*) Co. Litt. 53.

gave an adequate remedy by writ of waste (*a*), in lieu of which an action on the case is now maintainable. This latter remedy, indeed, is more widely applicable than was the action of waste, which lay for him only who had the inheritance in reversion or remainder in the land wasted, whereas case will lie for him entitled as reversioner or remainder-man for life or years (*b*). In such action the defendant, on the trial, may give in evidence any thing that proves there was no waste committed, as that the destruction happened by lightning, tempest, the king's enemies, or other inevitable accident (*c*). An action will not, however, lie for permissive waste (*d*).

Withholding
service
due by cus-
tom and
prescrip-
tion.

A service is sometimes due by ancient custom and prescription only, for the withholding of which a remedy by action may be had. Such is that of doing suit to another's mill: where the persons, resident in a particular place, by usage time out of mind have been accustomed to grind their corn at a certain mill; and afterwards any of them go to another mill, and withdraw their suit (their *secta*, *a sequendo*) from the ancient mill. This may be not only a damage, but an injury to the owner; such prescription, indeed, might have had a very reasonable foundation; viz., upon the erection of such mill by the ancestor of the owner for the convenience of the inhabitants, on condition, that, when erected, they should all grind their corn there only. And for this injury the owner might formerly have had a writ *de sectâ ad molendinum* (*e*), commanding the defendant to do his suit at that mill, *quam ad illud facere debet, et solet*, or show good cause to the contrary: in which action the validity of the prescription might have been tried, and if it were found for the owner, he was entitled to recover damages against the defendant (*f*).

(*a*) Abolished by 3 & 4 Will. 4,
c. 27, s. 36.

(*b*) See *Bacon v. Smith*, 1 Q. B.
345.

(*c*) Co. Litt. 53.

(*d*) 5 Rep. 13. Hale, MSS.

(*e*) F. N. B. 123.

(*f*) Co. Ent. 461.

In like manner, and, for like reasons, the register (*g*) informs us, that a man might have had a writ of *secta ad furnum, secta ad torrale, et ad omnia alia hujusmodi*; for suit due to his *furnum*, his public oven or bakehouse; or to his *torrale*, his kiln or malthouse: when a person's ancestors had erected a convenience of that sort for the benefit of the neighbourhood, upon an agreement (proved by immemorial custom) that all the inhabitants should use and resort to it when erected. But these special remedies to compel the performance of services such as mentioned have been abolished (*h*), and an action on the case is now the appropriate remedy for the party thus injured.

II. A wrong may be done to an incorporeal hereditament, by hindering or disquieting the owner in his regular and lawful enjoyment of it (*i*). Such wrong may be constituted by disturbance—1. of a franchise; 2. of common; 3. of a way; 4. of a fair or market; 5. of an ancient ferry; 6. of tenure; 7. of patronage.

II. Wrongs to incorporeal hereditaments.

1. Disturbance of a franchise happens when a man has the franchise of holding a court-leet, of keeping a fair or market, of free-warren, of taking toll, of seizing waifs or estrays, or (in short) any other species of franchise whatsoever; and he is disturbed or incommoded in the lawful exercise thereof. As if another, by distress, menaces, or persuasions, prevails upon the suitors not to appear at my court; or obstructs the passage to my fair or market; or hunts in my free-warren; or refuses to pay me an accustomed toll; or hinders me from seizing the waif or estray, whereby it escapes or is carried out of my liberty; in any case of this kind, there is an injury done to the legal owner; his property is damnified; and the profits arising from such his franchise are diminished; to remedy which, he is entitled to sue for damages by a special action on

1. Disturbance of franchise.

(*g*) Fol. 153.

(*i*) Finch, L. 187.

(*h*) 3 & 4 Will. 4, c. 27, s. 36.

the case: or, for toll, the owner may take a distress if he pleases (*j*).

2. Disturb-
ance of
common.

2. The disturbance of common occurs where an act is done, by which the right of another to his common is incommoded or diminished. This may happen, where one who has no right of common, puts his cattle on the land; and thereby robs the cattle of the commoners of their respective shares of the pasture. Or if one, who has a right of common, puts in cattle which are not commonable, as hogs and goats; which amounts to the same inconvenience. But the lord of the soil may (by custom or prescription, but not without) put a stranger's cattle on to the common (*k*); and also, by a like prescription for common appurtenant, cattle that are not commonable may be put on to the common (*l*). The lord also of the soil may justify making burrows therein, and putting in rabbits, provided they do not increase to so large a number as to destroy the common (*m*). But in general, in case the beasts of a stranger, or the uncommonable cattle of a commoner, be found upon the land, the lord or any of the commoners may distrain them damage-feasant (*n*). And the commoner may bring an action on the case to recover damages, without proving any specific damage to himself, against a person wrongfully depasturing cattle on the common, because the law considers that the right of the commoner is injured by such an act, and therefore allows him to bring an action for it to prevent a wrongdoer from gaining a right by repeated acts of encroachment. For wherever any act injures another's right, and would be evidence in future in favour of the wrongdoer, an action may be maintained for an invasion of that right, without proof of specific injury; that is to say, wherever one man does an act, which, if repeated, would operate in derogation of the right of another, he is liable to an action,

(*j*) Cro. Eliz. 558.

(*k*) 1 Roll. Abr. 396.

(*l*) Co. Litt. 122.

(*m*) Cro. Eliz. 876; Cro. Jac. 195.

(*n*) *Marys's Case*, 9 Rep. 112 b.

without proof of particular damage, at suit of the person whose right may be so affected (*o*).

Another disturbance of common is by surcharging it; or putting more cattle thereon than the pasture and herbage will sustain, or the party has a right to do. In this case he who surcharges does an injury to the rest of the owners, by depriving them of their respective portions, or at least diminishing them. This injury by surcharging can, properly speaking, only happen, where the common is appendant or appurtenant (*p*), and of course limitable by law; or where, when in gross, it is expressly limited and certain.

The remedy, for surcharging the common, is either by distraining so many of the beasts as are above the number allowed, or else by an action of trespass, which may be had by the lord; or by an action on the case, in which any commoner may be plaintiff (*q*).

(*o*) *Harrop v. Hirst*, L. R. 4 Ex. 43, and cases there cited; 1 Wms. Saund. 346.

(*p*) *Ante*, vol. ii., chap. 3.

(*q*) *Dixon v. James*, Freem. 273.

The ancient method of proceeding, under the circumstances, *supra*, was by writ of admeasurement of pasture. This lay either where a common appurtenant or in gross was certain as to number, or where a man had common appendant or appurtenant to his land, the quantity of which common had never been ascertained. In either of these cases, any of the commoners was entitled to this writ of admeasurement; which was directed to the sheriff, and not returnable to any superior court, till finally executed by him. It recited a complaint, that the defendant had surcharged, *superoneravit*, the common: and therefore commanded the sheriff to admeasure and apportion

it; that the defendant might not have more than belonged to him, and that the plaintiff might have his rightful share. And upon this suit all the commoners were to be admeasured, as well those who had not, as those who had surcharged the common; as well the plaintiff as the defendant. The execution of the writ was by a jury of twelve men, who were upon their oaths to ascertain, under the superintendence of the sheriff, what and how many cattle each commoner was entitled to feed. And the rule for this admeasurement was generally understood to be, that the commoner should not turn more cattle upon the common than were sufficient to manure and stock the land to which his right of common was annexed; or, as our ancient law expressed it, such cattle only as were levant and couchant upon his tenement.

There is yet another disturbance of common to be here noticed, when the owner of the land, or other person, so encloses (*r*) or obstructs it, that the commoner is precluded from enjoying the benefit therefrom to which he is by law entitled. This may be done, by erecting houses or fences on the common, or by driving the cattle off the land, or by ploughing up the soil of the common (*s*). Or it may be done by erecting a warren therein, and stocking it with rabbits in such quantities, that they devour the whole herbage, and thereby destroy the common. For the law looks upon this as an injurious disturbance of the commoner's right, and has given him his remedy by action against the owner (*t*).

The policy of our law, however, is not to allow a commoner to abate a nuisance upon the common, except only in few cases, for an action will best ascertain the just measure of the damage which may have been sustained. But if the lord erect a wall, gate, hedge, or fence round the common, to prevent the commoner's cattle from going into the common, the commoner may abate the erection (*u*), because it is inconsistent with the grant actual or presumed under which he claims. The interest which a commoner has in the common, is usually to eat the grass by the mouths of his cattle. But he cannot cut the grass, wood, bushes, fern, or other things growing on the common, nor can he make fish-ponds there (*x*). So if the lord plant trees on the common, whereby the commoner cannot have his common so beneficially as he ought, the commoner cannot cut them down, for they are part of the soil itself; but he must bring an action on the case against the lord (*y*).

(*r*) As to the enclosure of commons by act of parliament, *ante*, vol. ii.

(*s*) *Leverett v. Townsend*, Cro. Eliz. 198.

(*t*) *Hadesden v. Gryssel*, Cro. Jac. 195.

(*u*) *Davies v. Williams*, 16 Q. B. 546, and cases cited *ante*, p. 6.

(*x*) *Carrill v. Pack*, 2 Bulstr. 115; *Howard v. Spencer*, 1 Sid. 251.

(*y*) *Sadgrove v. Kirby*, 6 T. R. 483; 1 B. & P. 13.

And if the lord's rabbits increase so much that there is not a sufficiency of common left, the commoner cannot fill up the coney burrows, for that would be a meddling with the soil, but he must bring his action (*z*). Much less can a commoner kill the rabbits to prevent their increase to the prejudice of the common (*a*).

3. Another species of disturbance, that of ways, principally happens when a person, who has a right of way over another's ground, by grant or prescription, is obstructed in exercising it by enclosures, or other obstacles, or by ploughing across it: by which means he cannot enjoy his right of way, or at least cannot enjoy it in so commodious a manner as he might have done. The remedy for such disturbance is by an action on the case to recover damages (*b*). 3. Disturbance of way.

4. Again, if I am entitled to hold a fair or market, and another person sets up a fair or market so near mine that he does me a prejudice, it is a nuisance to the freehold which I have in my market or fair (*c*). But in order to make this out to be a nuisance, it is necessary, 1. That my market or fair be the elder, otherwise the nuisance lies at my own door. 2. That the market be erected within the third part of twenty miles from mine. For Sir Matthew Hale (*d*) construes the *dicta*, or reasonable day's journey mentioned by Bracton (*e*), to be twenty miles; and so it was understood to be, not only in our own law (*f*), but also in the civil (*g*), from which we probably borrowed it. So that if the new market be not within seven miles of the old one, it is no nuisance: for it is held reasonable that every man should have a market within one-third of a day's journey from his own home; that the day being 4. Disturbance of a fair or market.

(*z*) *Cooper v. Marshall*, 1 Burr. 259; 2 Wils. 51.

(*a*) 1 Roll. Abr. 405, pl. 1, 2.

(*b*) Hale on F. N. B. 183; Lut. 111, 119.

See, further, as to the right of

way, *ante*, vol. ii. p. 42.

(*c*) F. N. B. 184.

(*d*) Hale on F. N. B. 184.

(*e*) L. 4, c. 46.

(*f*) 2 Inst. 567.

(*g*) Dig. 2, 11,

divided into three parts, he may spend one part in going, another in returning, and the third in transacting his necessary business there. If such market or fair be on the same day with mine, it is *primâ facie* a nuisance to mine, and there needs no proof of it, but the law will intend it to be so; but if it be on any other day, it may be a nuisance; though whether it is so or not, cannot be intended or presumed, but I must make proof of it to the jury.

5. Disturbance of an ancient ferry.

5. Likewise, if a ferry is erected on a river, so near another ancient ferry as to draw away its custom, it is a nuisance to the owner of the old one. For where there is a ferry by prescription, the owner is bound to keep it always in repair and readiness, for the ease of all the subjects of the crown; otherwise he may be grievously amerced (*h*): it would be therefore extremely hard, if a new ferry were suffered to share his profits, which does not also share his burthen. But where the reason ceases, the law also ceases with it: therefore it is no nuisance to erect a mill so near mine, as to draw away the custom, unless the miller also intercepts the water. Neither is it a nuisance to set up any trade, or a school, in a neighbourhood or rivalship with another: for by such emulation the public are like to be gainers; and, if the new mill or school occasion a damage to the old one, it is *damnum absque injuriâ* (*i*).

6. Disturbance of tenure.

6. Another species of disturbance mentioned by legal writers of repute, although perhaps unknown at the present day, is that of disturbance of tenure, or breaking that connection which subsists between the lord and his tenant, and which the law will not suffer to be wantonly dissolved by the act of a third person. To have an estate well tenanted is an advantage of which every landlord must be sensible: and therefore the driving away of a tenant from off his estate is an injury of no small consequence. So that if there be a tenant at will of any lands

(*h*) 2 Roll. Abr. 140.

(*i*) Hale on F. N. B. 184.

or tenements, and a stranger either by menaces and threats, or by unlawful distresses, or by fraud and circumvention, or other means, contrives to drive him away, or inveigle him to leave his tenancy, this the law might justly construe to be a wrong and injury to the lord (*k*), and might give him a reparation in damages against the offender by an action on the case.

7. The last and most considerable species of disturbance to be noticed, is that of patronage; being a hindrance or obstruction of the patron in presenting his clerk to a benefice. 7. Disturbance of patronage.

This injury was distinguished at common law from another species of injury, called usurpation; which is an absolute ouster or dispossession of the patron, and happens when a stranger, who has no right, presents a clerk, who is thereupon admitted and instituted (*l*). In which case, of usurpation, the patron lost by the common law not only his turn of presenting *pro hac vice*, but also the absolute and perpetual inheritance of the advowson, so that he could not present again upon the next avoidance, unless in the mean time he recovered his right by a real action, viz., a writ of right of advowson (*m*), now abolished (*n*). The reason given for his losing the present turn, and not ejecting the usurper's clerk, was that the final intent of the law in creating this species of property being to have a fit person to celebrate divine service, it preferred the peace of the church (provided a clerk were once admitted and instituted) to the right of any patron whatever (*o*). And the patron also lost the inheritance of his advowson, unless he recovered it in a writ of right, because by such usurpation he was put out of possession of his advowson, as much as when by actual entry and ouster, he was disseised of lands or houses; since the only possession of which an advowson is capable, is by actual presentation and admission of one's clerk. As,

(*k*) Hale, Anal. c. 40; 1 Roll. Abr. 108.

(*l*) Co. Litt. 277.

(*m*) 6 Rep. 49.

(*n*) 3 & 4 Will. 4, c. 27, s. 36.

(*o*) *Boswell's Case*, 6 Rep. 48.

therefore, when the clerk was once instituted (except in the case of the crown, where he must also be inducted (*p*)) the church became absolutely full; so the usurper by such plenarty, arising from his own presentation, became in fact seised of the advowson: which seisin it was impossible for the true patron to remove by any possessory action, or other means, during the plenarty or fulness of the church; and when it became void afresh, he could not then present, since another had the right of possession. The only remedy therefore, which the patron had left, was to try the mere right in a writ of right of advowson; which was a peculiar writ of right, framed for this special purpose (*q*): and if a man recovered therein, he regained the possession of his advowson, and was entitled to present at the next avoidance (*r*). But in order to such recovery he must have alleged a presentation in himself or some of his ancestors, proving him or them to have been once in possession: for, as a grant of the advowson, during the fulness of the church, conveys no manner of possession for the present, therefore a purchaser, until he had presented, had no actual seisin whereon to ground a writ of right (*s*). Thus stood the common law.

But bishops in ancient times, either by carelessness or collusion, frequently instituting clerks upon the presentation of usurpers, and thereby defrauding the real patrons of their right of possession, it was in substance enacted by statute Westm. 2, 13 Ed. 1, c. 5, s. 2, that if a possessory action were brought within six months after the avoidance, the patron should (notwithstanding such usurpation and institution) recover that very presentation; which gave back to him the seisin of the advowson. Yet still, if the true patron omitted to bring his action within six months, the seisin was gained by the usurper, and the patron, to recover it, was driven to the long and hazardous

(*p*) 6 Rep. 49.

(*q*) F. N. B. 30.

(*r*) F. N. B. 36.

(*s*) 2 Inst. 357.

process of a writ of right. To remedy which it was further enacted by statute 7 Anne, c. 18, that no usurpation shall displace the estate or interest of the patron, or turn it to a mere right; but that the true patron may present upon the next avoidance, as if no such usurpation had happened. So that the title of usurpation was thus much narrowed, and the law now stands upon this reasonable foundation: that if a stranger usurps my presentation, and I do not pursue my right within six months, I shall lose that turn without remedy, for the peace of the church, and as a punishment for my own negligence; but that turn is the only one I shall lose thereby. Usurpation now gains no right to the usurper, with regard to any future avoidance, but only to the present vacancy: it cannot indeed be remedied after six months are past; but during those six months, it is only a species of disturbance.

Disturbers of a right of advowson may therefore be these three persons; the pseudo-patron, his clerk, and the ordinary; the pretended patron, by presenting to a church to which he has no right, and thereby making it litigious or disputable; the clerk, by demanding or obtaining institution, which tends to and promotes the same inconvenience; and the ordinary, by refusing to admit the real patron's clerk, or admitting the clerk of the pretender. These disturbances are vexatious and injurious to him who has the right: and therefore, if he be not wanting to himself, he may still have for his relief a writ of *quare impedit*; in which the patron, not the clerk, is plaintiff. For the law supposes the injury to be offered to the patron only, by obstructing or refusing the admission of his nominee; and not to the clerk, who has no right in him till institution, and of course can suffer no injury.

I proceed therefore to inquire into the nature of a *quare impedit*, now the only action available for the disturbance of patronage: and shall first premise the usual proceedings previous to bringing it.

Upon the vacancy of a living, the patron, we know, is

bound to present within six calendar months (*t*), otherwise it will lapse to the bishop. But if the presentation be made within that time, the bishop is bound to admit and institute the clerk, if found sufficient (*u*); unless the church be full, or there be notice of any litigation. For if opposition be intended, it is usual for each party to enter a *caveat* with the bishop, to prevent institution of his antagonist's clerk. An institution after a *caveat* entered is void by the ecclesiastical law (*x*); but this the temporal courts pay no regard to, and look upon a *caveat* as a mere nullity (*y*). But if two presentations be offered to the bishop upon the same avoidance, the church is then said to become litigious; and, if nothing further be done, the bishop may suspend the admission of either, and suffer a lapse to incur. Yet if the patron or clerk on either side request him to award a *jus patronatûs*, he is bound to do it. A *jus patronatûs* is a commission from the bishop, directed usually to his chancellor and others of competent learning: who are to summon a jury of six clergymen and six laymen, to inquire into and examine who is the rightful patron; and if, upon such inquiry made and certificate thereof returned to the commissioners, he admits and institutes the clerk of that patron whom they return as the true one, the bishop secures himself at all events from being a disturber, whatever proceedings may be had afterwards in the temporal courts (*z*).

Duplex
querela.

The clerk refused by the bishop may also have a remedy against him in the spiritual court, denominated a *duplex querela* (*a*): which is a complaint in the nature of an appeal from the ordinary to his next superior; and if the superior court adjudges the cause of refusal to be insufficient, it will grant institution to the appellant (*b*).

(*t*) *Ante*, vol. ii.

(*u*) *Ante*, vol. i.

(*x*) 1 Burn, Ecc. L., 9th ed. p.

23.

(*y*) 1 Roll. Rep. 191.

(*z*) 1 Burn, Ecc. L., 9th ed., p. 22, *et seq.*

(*a*) *Ib.* 159.

(*b*) *Ante*, vol. i.

Thus far matters may go on in the mere ecclesiastical course; but in contested presentations they seldom go so far: for, upon the first delay or refusal of the bishop to admit his clerk, the patron may bring his action of *quare impedit* against the bishop, for the temporal injury done to his property, in disturbing him in his presentation. And, if the delay arises from the bishop alone, as upon pretence of incapacity, or the like, then he only is sued; but if there be another presentation set up, then the pretended patron and his clerk are also joined in the action; or it may be brought against the patron and clerk, leaving out the bishop; or against the patron only. But it is most advisable to bring it against all three: for if the bishop be left out, and the suit be not determined till the six months are past, the bishop is entitled to present by lapse; for he is not party to the suit; but, if he be named, no lapse can possibly accrue till the right is determined. If the patron be left out, and the action be brought against the bishop and the clerk only, the suit is of no effect, and will abate; for the right of the patron is the principal question in the cause (c). If the clerk be left out, and has received institution before the action brought (as is sometimes the case), the patron by this suit may recover his right of patronage, but not the present turn; for he cannot have judgment to remove the clerk, unless he be made a defendant, and party to the suit, to hear what he can allege against it. For which reason it is the safer way to bring the action against all three.

Quare impedit is now commenced by a writ of summons issuing out of the court of common pleas, in the same manner and form as the writ of summons in an ordinary action, and upon such writ is indorsed a notice that the plaintiff intends to declare in *quare impedit* (d). The service of the writ, appearance of the defendant, proceedings in default of appearance, pleadings, judgment, execution,

(c) *Hall v. Bishop of Bath and Wells*, 7 Rep. 25; Hob. 316.

(d) 23 & 24 Vict. c. 126, s. 26.

and all other proceedings and costs upon the writ, have been made subject to the same rules and practice, as nearly as may be, as the proceedings in an ordinary action (*e*), of which a sketch will be given in our next chapter; and therefore it seems unnecessary to insert at length in these pages the practice and procedure in a suit such as treated of in accordance with the antiquated form (*f*). Thus much, however, may properly be said, that the plaintiff in a *quare impedit* must state his title, and prove at least one presentation in himself, his ancestors, or those under whom he claims; for he must recover by the strength of his own right, not by the weakness of the defendant: and he must also show a disturbance before the action brought. Upon this the bishop and the clerk may disclaim all title: save only, the one as ordinary, to admit and institute; and the other as presentee of the patron, who is left to defend his own right (*g*). And upon failure of the plaintiff in making out title, the defendant is put upon the proof of his, in order to obtain judgment for himself, if needful. But if the right be found for the plaintiff, on the trial, three further points are also to be inquired of: 1. If the church be full, and, if full, then of whose presentation: for if it be of the defendant's presentation, then the clerk is removable by writ brought in due time. 2. Of what value the living is: and this in order to assess the damages which are directed to be given by the statute of Westm. 2, 13 Edw. 1, c. 5. 3. In case of plenarty upon an usurpation, whether six calendar (*h*) months have passed between the avoidance and the time of bringing the action: for then it would not be within the statute, which permits an usurpation to be divested by a *quare impedit*, brought *infra tempus semestris*. So that plenarty is still a sufficient bar

(*e*) 23 & 24 Vict. c. 126, s. 27.

(*f*) See Rogers, Ecc. L., 2nd ed., p. 24 *et seq.*

(*g*) See the pleadings in a *quare impedit* (commenced since the first

Common Law Procedure Act), *Marshall v. Bishop of Exeter*, 6 C. B. N. S. 716; 7 C. B. N. S. 653; 13 id. 820; L. R. 3 H. L. 17.

(*h*) 2 Inst. 361.

in an action of *quare impedit*, brought above six months after the vacancy happens; as it was universally by the common law, however early the action was commenced.

If it be found that the plaintiff has the right, and has commenced his action in due time, then he shall have judgment to recover the presentation; and, if the church be full by institution of any clerk, to remove him: unless it were filled *pendente lite* by lapse to the ordinary, he not being party to the suit; in which case the plaintiff loses his presentation *pro hac vice*, but shall recover two years' full value of the church from the defendant the pretended patron, as a satisfaction for the turn lost by his disturbance (*i*). But if it should so happen that the church remains still void at the end of the suit, then that party to whom the presentation is found to belong, whether plaintiff or defendant, shall have a writ directed to the bishop, ordering him to admit and institute the clerk of the prevailing party (*k*).

A period of limitation in *quare impedit* is now prescribed by the statute 3 & 4 Will. 4, c. 27, explained and interpreted by the 6 & 7 Vict. c. 54. By sect. 30 of the former of these statutes the period is defined to be that, during which three clerks in succession shall have held the benefice in question, all of whom shall have obtained possession thereof adversely to the right of presentation or gift of the person seeking to enforce his right to present, or of some person through whom he claims, if the times of such incumbencies taken together shall amount to the full period of sixty years, and if they shall not, then after the expiration of such further time as with them will make up the full period of sixty years. And where after an adverse possession of the benefice has been obtained, the crown or the ordinary presents by reason of a lapse, such a presentation is to be deemed adverse; except when the avoidance is in consequence of the incumbent being made a bishop,

(*i*) Stat. Westm. 2, 13 Edw. 1, (*k*) F. N. B. 38.
c. 5, s. 3.

in which case the incumbency of the successor is to be deemed a continuation of that of the bishop (*l*). And by sects. 33 and 34, after an adverse possession of one hundred years, the right to an advowson is extinguished.

The more recent of the above statutes (6 & 7 Vict. c. 54, s. 3) enacts, that the several periods limited "for bringing a *quare impedit*, or other action, or any suit to enforce a right to present to or bestow any ecclesiastical benefice, shall apply to the case of any bishop claiming a right as patron to collate to or bestow any ecclesiastical benefice, and that such right shall be extinguished in the same manner and at the same periods as the right of any other patron" to present to or bestow a benefice; but the right of a bishop to collate by reason of lapse remains unaffected by the foregoing enactment.

(*l*) Sect. 31.

CHAPTER XII.

PROCEEDINGS IN THE SUPERIOR COURTS OF LAW. AN ACTION AT LAW.

THE rights and obligations of which our courts of law take cognisance, and for the invasion or breach of which they afford a remedy by action, having been treated of in other parts of this work, we propose here to give some general account of an action at law, and the proceedings in it.

We must here accordingly repeat (a) that actions have been from ancient times divided into three classes,—real, personal, and mixed. Real actions are those brought for the recovery of real property only; mixed, for the recovery of real property, and damages for its being wrongfully withholden; while personal actions extend to all claims for money due on contracts, or for damages for breach of contract, or injury to person or property, and also to the recovery of specific goods and chattels, though not for the recovery of land. Personal actions are broadly divided into actions *ex contractu* and *ex delicto*, and they embrace perhaps the widest range of those civil differences that can become subjects of litigation in this country.

Proceedings
before trial.

In this chapter we shall speak of procedure only, and will treat of it in an ordinary personal action. It may here be premised that the very numerous and highly technical forms of real and mixed actions which existed prior to the 3 & 4 Will. 4, c. 27, were by that Act all abolished except four, viz., writ of right of dower, dower *unde nihil habet*, *quare impedit*, and ejectment; and by the Common Law Procedure Act, 1860, it was further enacted (b) that

(a) *Ante*, pp. 126, 127.

(b) Sect. 26.

no writ of right of dower, or writ of dower *unde nihil habet*, and no plaint for freebench or dower (c) in the nature of any such writ, and no *quare impedit* should be brought after the commencement of that Act in any court whatsoever; but where any such writ, action, or plaint would lie, either in a superior or in any other court, an action might be commenced by writ of summons issuing out of the court of common pleas, in the same manner and form as the writ of summons in an ordinary action; and by s. 27 the writ, and all proceedings thereupon are to be, as nearly as may be, the same as in ordinary actions. The action of ejectment is treated of in another part of this work (d).

Taking the case, then, of an ordinary personal action, it may be first observed that the proceedings in it are so regulated throughout that judgment is given against no man without his having been heard, or through his own default refusing to be heard after due notice of the grounds of claim against him. The action is commenced by the complainant summoning the defendant to appear in the action to answer a complaint against him. The appearance required of him is not at this stage of the proceedings an appearance in open court, but a formal entry in writing at the proper office of the court made by the defendant or his attorney, which in effect admits that the defendant has been duly summoned, and is ready to defend himself against any complaint the plaintiff may bring against him in the action. The instrument by which he is thus summoned is called a writ of summons, and may be issued at the option of the plaintiff out of any one of the superior courts of common law,—the queen's bench, the common pleas, or the exchequer.

It is not necessary to mention any form or cause of action in the writ of summons (e), a statement of the grounds

(c) Dower is for the specific recovery of dower, *quare impedit*, for obstruction to the right to present to

a benefice, *ante*, chap. xi.

(d) *Ante*, pp. 273 *et seq.*

(e) C. L. P. Act, 1852, s. 2.

of complaint being usually made at a subsequent stage, whether the defendant appears or makes default by not appearing.

A statement of the grounds of claim against the defendant is in some sort an essential preliminary to obtaining judgment against him, it is however only in certain cases specially provided for,—for example in cases that come under the provisions of the 25th and 27th sections of the Common Law Procedure Act, 1852, relating to special indorsements of the particulars of debts or liquidated demands on the writ of summons, where judgment follows on the writ without any further statement of the cause of action on default of appearance; also, in proceedings under the summary Bills of Exchange Act, 1855 (*f*), where the statement of the cause of action is on the writ, judgment follows, unless the defendant appears after leave obtained for that purpose in the manner provided by that Act.

Though the court issues the writ, it may be obtained as a matter of course by any person who seeks to commence an action against another. It is open to any person who conceives he has a cause of action against another at his own pleasure, and it may be added, at his own risk, to sue out a writ of summons against him; all that is necessary is for the plaintiff or his attorney to prepare the writ in accordance with the statutory form, take it to the writ office of the court in which the action is brought, and have it impressed with the seal of the court, at the same time leaving a *præcipe*, or memorandum of the writ with the officer who files it and enters the date thereof and other particulars.

The forms of the writ of summons in personal actions, and certain indorsements to be made on it, the appearance, and many other matters relating to the process by which an action is commenced, are regulated by s. 2 of the Common Law Procedure Act, 1852, and those sections

(*f*) 18 & 19 Vict. c. 67.

that follow next in succession to s. 33 inclusive (*g*), taken in connection with schedule (A.) of the Act. Among other things it may be noticed that the writ is entitled in the queen's name, bears date the day it issues, is tested in the name of the chief justice or chief baron of the court, or in case of a vacancy in that of the senior judge, and states the name of the plaintiff and the name and residence, or supposed residence of the defendant to whom it is addressed, and certain indorsements are required to be made on it (*h*). The common indorsements (*i*) on the writ are the name and place of abode of the attorney who sues it out, or the address of the plaintiff if it be sued out by him in person. In all actions which are brought for the payment of any debt, the amount of the debt and costs is to be indorsed on the writ, and if they be paid within four days from service of the writ the proceedings will be stayed. This indorsement does not, like the special indorsement we have already alluded to, give a statement or particulars of the grounds of action, but merely of the amount due and

(*g*) The statutes and the *regulae generales* of the judges, under provisions contained in them, on which the procedure of the superior courts of law now mainly depends, are : the Com. Law Proc. Act, 1852 ; the Com. Law Proc. Act, 1854 ; the Summary Procedure on Bills of Exchange Act, 1855 ; and the Com. Law Proc. Act, 1860. It should be observed, also, that there are many unwritten rules of practice not affected by the statutory provisions, and which form part of the practice of the courts.

(*h*) Sect. 20 of the act is as follows :—If the plaintiff or his attorney shall omit to insert in or indorse on any writ or copy thereof any of the matters required by this act to be inserted therein or indorsed thereon, such writ or copy

thereof shall not on that account be held void, but it may be set aside as irregular, or amended, upon application to be made to the court out of which the same shall issue, or to a judge ; and such amendment may be made, upon any application to set aside the writ, upon such terms as to the court or judge may seem fit.

(*i*) Where a mandamus is claimed in the action on an injunction, the plaintiff must indorse his writ accordingly. See, as to mandamus, s. 68, and as to injunction, ss. 79 and 80 of the act of 1854 ; and see also as to the notices required to be indorsed where the plaintiff intends to declare in dower or for freebench, or in *quare impedit*, as the case may be. Com. Law Proc. Act, 1860, s. 26.

the costs up to that time, in order to give the defendant an opportunity of staying further proceedings by paying them (*j*). If the amount indorsed is not paid within the four days the action may proceed as if the indorsement had not been made. The special indorsement is provided for by s. 25 of the Procedure Act of 1852 in cases where the defendant resides within the jurisdiction of the court, and the claim is for a debt or liquidated demand in money with or without interest, arising on a contract express or implied (*k*). In such and similar cases the plaintiff is at liberty to make upon the writ of summons and copy thereof a special indorsement of the particulars of the claim in the form contained in the schedule (A.) to that Act, and the effect of this section in connection with the subsequent section (s. 27) of the Act, is that final judgment may be signed in default of appearance, and execution may issue against the defendant within eight days after the last day for entering an appearance. Section 25 also contains a provision that it shall be lawful for the court or a judge, either before or after final judgment, to let in the defendant to defend upon an application supported by satisfactory affidavits accounting for non-appearance, and disclosing a defence on the merits.

The essential preliminary—that there must be a statement of the cause of action duly notified to the defendant before judgment can be obtained against him, will be exemplified by noticing a little more in detail the difference between the mode of proceeding on the writ specially indorsed and the procedure on that which is not so, where default is made in appearing. On the writ specially indorsed with the statement of the grounds of claim or cause of action, judgment may be signed at once for non-appearance, on an affidavit being filed of personal service of the writ of summons or a judge's order for leave to proceed, and a copy of the writ of summons; but in the

(*j*) See Com. Law Proc. Act, 1852, s. 8.

(*k*) See the instances given in the section.

case of the writ not specially indorsed, on which there is no statement of the cause of action, there must not only be such affidavit, and a copy of the writ filed, but also a declaration, which is a written statement of the cause of action, must be filed, indorsed with a notice to plead in eight days, and to sign judgment by default at the expiration of the time to plead so indorsed ; and in the event of no plea being delivered, where the cause of action stated in the declaration is for any of the claims which might have been inserted in a special indorsement, and the amount claimed is indorsed on the writ of summons, final judgment may be signed and execution issue for an amount not exceeding the amount indorsed on the writ, with interest and costs as in the Act specified.

The forms of the ordinary writ of summons, and the specially indorsed writ, and the writs for service out of the jurisdiction, though in other respects they may differ, have this feature in common, that they require the defendant to cause an appearance to be entered for him in the court out of which the writ issues in the action at the suit of the plaintiff within a certain time after service of the writ, and give him notice that in default of his doing so, the plaintiff may proceed to judgment and execution (*l*). The time within which an appearance is required to be entered is, in the case of the writs for service within the jurisdiction, a fixed period of eight days after the service of the writ, inclusive of the day of such service; but in writs for service out of the jurisdiction, the time for appearance is regulated by the distance from England of the place where the defendant resides. It may here be observed with regard to proceeding to "judgment and execution," that in the case of a defendant who is out of the jurisdiction, "execution" can only issue against property which he may have in this country.

The original writ of summons is in force for six (*m*)

(*l*) Com. Law Proc. Act, 1852,
Sched. (A.).

(*m*) Com. Law Proc. Act, 1852,
s. 11.

months (*n*) only from the day of its date. Concurrent writs (*o*) may, however, be issued, certain prescribed formalities being complied with; these concurrent writs bearing the same date as the original writ, but being only in force for the period during which the original writ is in force. The use of a concurrent writ is to give a better opportunity of serving the defendant or defendants in the action than a simple writ would afford. For instance, the ordinary writ of summons for service within the jurisdiction may be served in any county, but if the defendant be found to be residing abroad (*p*), a concurrent writ may issue for service out of the jurisdiction for the purpose of reaching him there. The original writ must be served within six months from the date unless it be renewed, as it may be with certain formalities prescribed by the Act (*q*) before the expiration of the six months, and such renewal may be repeated from time to time. In this way an action may be commenced and kept alive for years, and when service is ultimately effected, be it sooner or later, the commencement of the action against the defendant is the original writ of summons, which remains in force, and is available to prevent the operation of any statute whereby the time for the commencement of the action may be limited, and for all other purposes from the date of the issuing of the original writ of summons. The service of the writ of summons must, wherever it is practicable, be personal (*r*) (personal service being effected by informing the defendant of the writ, and at the same time delivering a copy of it to him, and showing the

(*n*) Calendar months; the word "month," in an act of parliament, meaning calendar months, unless the contrary is expressed, 13 & 14 Vict. c. 21, s. 4. Com. Law Proc. Act, 1852, s. 9.

(*o*) Com. Law Proc. Act, 1852, ss. 9, 22.

(*p*) A writ for service within the jurisdiction may be concurrent with a writ for service out of the jurisdiction, and *vice versa*, Com. Law Proc. Act, 1852, s. 22.

(*q*) Com. Law Proc. Act, 1852, s. 11.

(*r*) *Ibid.* s. 17.

original if demanded (*s*)), and though provisions are made for proceeding in the action where personal service cannot be effected, but the defendant knows of the writ and evades the service, yet this is matter of special application to the court or a judge, and it is only on being satisfied by affidavit that reasonable efforts have been made to effect personal service, and either that the writ has come to the knowledge of the defendant, or that he wilfully evades the service of the same, and has not appeared thereto, that an order will be granted by the court or a judge, that the plaintiff be at liberty to proceed as if personal service had been effected, subject to such conditions as to the court or judge may seem fit (*t*).

The foregoing observations indicate the strict course of proceeding at the commencement of an action. It is very usual, however, for the necessity of personal service to be obviated by the defendant's attorney undertaking to appear for him (*u*). It should also be observed that application for payment of a money demand or for redress of an injury, almost always, except in cases of urgency, precedes the actual issue of the process by which the action is commenced, and that in some cases of an exceptional character a formal step, preliminary to the issue of the writ is necessary, as for instance, where in an action against a person in office, or engaged in the execution of public works, a formal notice of action is by some express statutory enactment rendered necessary before the issuing of the writ.

(*s*) An indorsement of the day of service must be made on the writ by the person serving it, s. 15.

(*t*) There are special provisions enacted by various statutes for the service of the writ of summons in particular cases, where the defendants are some public body or company. Service on some particular official, or by leaving the writ

at a particular office of the public body or company being usually provided for. See, for example, Com. Law. Proc. Act, 1852, s. 16. Comp. Clauses Consolidation Act, 1845, s. 135; and the Companies Act of 1862, s. 64.

(*u*) An undertaking of this kind is enforceable by attachment. See Reg. Gen. Hil. T. 1853, r. 3.

The power of proceeding by action in this country against a defendant out of the jurisdiction, was first given by the Procedure Act of 1852 (x). It does not extend to a defendant, being a British subject, residing in Scotland or Ireland, and is limited to those cases where there is a cause of action which arose within the jurisdiction, or in respect of the breach of a contract made within the jurisdiction, and is carefully guarded throughout by provisions directed against any unfair advantage being taken of the defendant by reason of his absence from this country. As well in an action against a British subject residing out of the jurisdiction as in an action against a foreigner so residing, where the defendant has failed to appear within the time limited for that purpose, the plaintiff can only proceed by leave of the court or a judge, who, upon being satisfied by affidavit that there is a cause of action which arose within the jurisdiction, or in respect of the breach of a contract made within the jurisdiction, and that the writ was personally served upon the defendant, or that reasonable efforts were made to effect personal service thereof upon the defendant, and that it came to his knowledge, and either that the defendant wilfully neglects to appear to such writ, or that he is living out of the jurisdiction of the court in order to defeat and delay his creditors, may direct, from time to time, that the plaintiff shall be at liberty to proceed in the action in such manner, and subject to such conditions as to such court or judge may seem fit, having regard to the time allowed for the defendant to appear being reasonable, and to the other circumstances of the case ; it being also provided and required of the plaintiff that he prove the amount of the debt or damages claimed by him in such action, either before a jury, upon a writ of inquiry, or before one of the masters of the superior courts, in the manner provided in the Act, according to the nature of the case, as such court

(x) Com. Law Proc. Act, 1852, ss. 18, 19.

or a judge may direct, and the making such proof is a condition precedent to his obtaining judgment (y). The provisions in the Common Law Procedure Act, 1852, for meeting the case of wilful evasion of the service of the writ of summons, and for service out of the jurisdiction, have taken the place of certain very technical proceedings by distringas to compel an appearance, and outlawry on mesne process, which have been abolished from the time of that Act (z). An absconding debtor may, however, still be arrested under the stats. 1 & 2 Vict. c. 110, and 14 & 15 Vict. c. 52.

The appearance to a writ of summons is made by delivering to the proper officer of the court a memorandum in the form given by s. 31 of the Procedure Act of 1852.

As regards appearance, it is noticeable that special provisions are made by s. 33 of the above Act for proceedings where only some of several defendants appear to a writ specially indorsed. The plaintiff may either sign judgment against the defendants who have not appeared, and issue execution against them, before declaring against the defendants who have appeared, in which case he will be taken to have abandoned his action against the latter, or he may, before issuing execution, declare against those who have appeared, stating, by way of suggestion, the judgment against those defendants who have not appeared, in which case the judgment so obtained against the defendant or defendants who have not appeared will operate and take effect in like manner as a judgment by default obtained against one or more of several defendants in an action of debt before the commencement of the Act. If the plaintiff elect to declare against those who have appeared, it is at the risk of having to prove the contract by all. He must allege, and if it is put in issue must prove (a)

(y) See, also, the penal provisions contained in s. 23 of the Com. Law Proc. Act, 1852, against false affidavits of service, or the fraudu-

lent use of them.

(z) See sect. 24.

(a) See an instance, *Robeson v. Ganderton*, 9 C. & P. 476.

at the trial a joint contract by all the defendants in the action (*i. e.*, both those who have and those who have not appeared), and if he fail to do so, the verdict at the trial will be against him, and he cannot have execution even against those who have let judgment go by default. The foregoing observations are made without reference to the exercise of the power of amendment which may or may not, under the circumstances of the particular case be exercisable for curing a misjoinder of the parties.

With regard to the joinder of parties in actions we may observe as follows: The non-joinder or misjoinder of plaintiffs and the misjoinder of defendants used formerly, before the Common Law Procedure Act of 1852, very frequently to give rise at the trial of a cause to objections which were fatal to proceedings on the part of the plaintiff, so that he entirely lost his action, and had his own and the defendant's costs to pay after all the expenses had been incurred preparatory to the trial, and the main expenses of the trial itself. Though the same principles must in general be applied now as formerly for determining who ought and who ought not to be joined in an action, yet for remedying the mischief above adverted to, powers of amendment (before or at the trial) of non-joinder and misjoinder are provided by ss. 34 & 35 of the Common Law Procedure Act, 1852 (*b*), accompanied with limitations and conditions guarding against injustice being done to any party by reason of their exercise.

Before entering further on the course of proceeding in an action, the different forms of personal actions may be shortly noticed. We have seen that it is no longer necessary to mention any form of action in the writ of

(*b*) And see the further provisions of the Com. Law Proc. Act, 1860, s. 19, for bringing actions in the names of all the persons in whom the legal right may be supposed to exist; and for judgment being given for one or more of the plain-

tiffs by whom the action is brought; the defendant, though unsuccessful, being entitled to his costs occasioned by joining any person or persons in whose favour judgment is not given, unless otherwise ordered by the court or a judge.

summons, and in the statements of causes of action given by schedule (B.) of the Act of 1852 as examples of the mode of preparing such statements no mention whatever is made of any form of action, and this harmonises with those provisions of the Act which allow of different causes of action being joined in the same suit (c) without reference to the forms of action to which they belong. Formerly it was matter of great importance, and sometimes of great nicety, to select the form of action applicable to the particular cause of action sued on, and not to include in the same action causes of action belonging to different forms; and an error in that respect might have proved fatal to the proceedings on grounds quite beside the real merits of the case. The remedial provisions of the Common Law Procedure Act, 1852, have on that head practically removed any danger of an action being defeated on grounds purely

(c) By the C. L. Proc. Act, 1852, s. 41, "Causes of action, of whatever kind, provided they be by and against the same parties and in the same rights, may be joined in the same suit;—but this shall not extend to replevin or ejectment; and where two or more of the causes of action so joined are local, and arise in different counties, the venue may be laid in either of such counties; but the court or a judge shall have power to prevent the trial of different causes of action together, if such trial would be inexpedient, and in such case such court or judge may order separate records to be made up, and separate trials to be had."

The above provision that the causes of action must be against the same parties and in the same rights goes to the character in which the plaintiff or defendant sues or is sued—not to the form of action—for instance, an executor or administrator

cannot sue in the same action for a claim in his representative capacity jointly with one which is quite irrespective of it, and which he makes in his own right, *ex. gr.*, he cannot join a claim for the price of goods sold by the testator or intestate with a claim for the price of his own goods sold by himself, neither can he be sued in the same action for money lent to the testator or intestate and for money lent to himself. There is, in the same act, a special clause (s. 40) as to joinder of claims by husband and wife with claims in right of husband for injury done to the latter. Where the injury which the wife complained of was some bodily injury, and a bill was incurred for medical attendance, the husband had to sue separately for the expenses incurred, but now he need no longer do so.

As to an action by husband and wife jointly, *ante*, p. 150; vol. i., chap. xv.

technical. But though forms of action are no longer a part of the visible machinery in the writ and pleadings, and are no longer allowed to intervene as an element of mischief in the proceedings in an action, they are still retained so far as they are beneficial, and are frequently referred to in arguments relating to legal wrongs as throwing light upon the question whether on a given state of facts there is any remedy or right of action at law.

The forms of the ordinary personal actions are *assumpsit*, *debt*, *covenant*, *trespass*, *case*, *trover*, *detinue*, and *replevin*.

Assumpsit lies for the breach of a contract not under seal; it sounds in damages, that is, it is essentially an action for damages, but these may include a liquidated as well as an unliquidated demand. Thus *assumpsit* might be brought simply for the price of goods sold, in which case the price to be paid measures the damages to be recovered; or it might be brought for breach of a warranty where the damages are necessarily left at large, and must be assessed on evidence of circumstances which show the loss sustained.

Debt is an action to recover a liquidated or certain sum of money owing from one man to another whether on a specialty (*c*), or by simple contract (*d*), or statute (*e*), or

(*c*) A debt by specialty, or special contract, is where a sum of money becomes, or is acknowledged to be, due, by deed or instrument under seal. Such as, by covenant, by deed of sale, by lease reserving rent, by bond or obligation: which last (as shown in vol. ii.), is a creation or acknowledgment of a debt from the obligor to the obligee, unless the obligor performs a condition thereunto usually annexed, as the payment of rent or money borrowed, the observance of

a covenant, and the like; on failure of which the bond becomes forfeited and the debt becomes due in law.

(*d*) A debt by simple contract is where the contract upon which the obligation arises is neither ascertained by matter of record, nor yet by deed or special instrument, but by mere oral evidence, the most simple of any; or by writing unsealed, which is capable of a more easy proof, and therefore better, than a mere verbal promise.

(*e*) Where a penalty is recover-

record (*f*), and lies wherever there is a direct and immediate liability to pay. The action of debt does not sound in damages, the recovery of the debt, *qua* debt, being the main object of the action, though nominal damages may be given for its detention—and sometimes damages more than nominal may in respect of such detention be recovered; for example, in those cases where interest, though not reserved in the contract out of which the debt arose, is by law allowed. It has been observed that in debt the liability to pay must be immediate and direct, and on this head nice distinctions prevailed. It was held, for example, that debt would not lie on a collateral covenant to pay a sum of money on default of another person, but that it would lie on an absolute covenant to pay a sum due from another person (*g*). Distinctions of this kind still exist in theory, but can no longer, as we have already seen, be made use of to prevent the determination of the case on its real merits. In either of the above instances the question would now simply

able by statute, debt may be made applicable either for the party aggrieved, or for the plaintiff in the action, or for the crown and the plaintiff. Further, an action for damages may sometimes lie against the hundred or other district in which an offence occurred, with a view to enforcing compensation to the plaintiff who has been damaged thereby. See, *ex. gr.*, 7 & 8 Geo. 4, c. 31, ss. 2, 3; 2 & 3 Will. 4, c. 72; 9 & 10 Vict. c. 99, s. 44.

(*f*) A debt of record is a sum of money which appears to be due by the evidence of a court of record. Thus, when any specific sum is adjudged to be due from the defendant to the plaintiff in an action or suit at law; this is a contract of the highest nature, being established by the sentence of a court of judi-

cature. A debt upon recognisance is also a sum of money, recognised or acknowledged to be due to the crown or a subject, in the presence of some court or magistrate, with a condition that such acknowledgment shall be void upon the appearance of the party, his good behaviour, or the like: and this, like the old statute-merchant and statute-staple, &c., if forfeited by non-performance of the condition, is also ranked among the first and principal class of debts, viz., debts of record; since the contract on which it is founded is witnessed by the highest kind of evidence, viz., by matter of record.

(*g*) See *Randall v. Rigby*, 4 M. & W. 130; *Evans v. Jones*, 5 M. & W. 295.

be, has the plaintiff stated a good cause of action, no matter under what form it ranges itself, entitling him to recover?

Covenant lies for breach of a covenant or agreement under seal. The action sounds in damages, but, like *assumpsit*, extends to liquidated as well as unliquidated demands, and is a concurrent remedy with the action of debt for specific sums directly and immediately payable by the covenantor to the covenantee on an absolute covenant to that effect.

Trespass, the nature of which has been already amply exemplified, lies for an injury to person or property, where such injury is direct and immediately results from the application of force.

The remedy in trespass, however, is not confined to an act of positive violence, it extends to any wrongful act when force, in fact, is used, however slight it may be, or however peaceably it may be exercised, provided the injury result immediately from it.

Case is an action for consequential injury—that is, injury arising indirectly and consequentially from the act complained of. It was long since observed (*h*), by way of illustrating the difference between trespass and case, that, “If a man throw a log into the highway, and in that act it hits me, I may maintain trespass, because it is an immediate wrong; but if, as it lies there, I tumble over it and receive an injury, I must bring an action upon the case.” One or two instances in addition to those mentioned in preceding pages may here be given illustrating the nature and applicability of this action. Thus slander, whereby a person’s character is injured, is the subject of an action on the case, and case would be the remedy for the wrongful obstruction of a watercourse, where the cause of obstruction was an erection made on the defendant’s own land, so as to indirectly interfere with the

(*h*) *Per* Lord Kenyon, *Day v. Edwards*, 5 T. R. 648.

watercourse on the plaintiff's land. Again, the action would be case where the defendant was sued for an injury inflicted by the careless driving of his carriage by his servant, the wrong complained of being the negligence of the person whom he employed in the course of his employment, and the injury resulting as a consequence from it.

Trover is a species of action on the case, and lies for the wrongful conversion of goods (*i*).

Detinue lies for the specific recovery of goods wrongfully detained, and damages for their detention (*k*).

Replevin is an action attended with many peculiarities, which have already been treated of at length (*l*), we will here merely repeat that it is commonly resorted to where goods have been wrongfully taken under a distress, though it has been held to apply to any unlawful taking of goods out of the possession of another (*m*).

After the defendant in the action has appeared to the writ formal pleadings preparatory to a trial commence. These pleadings are alternate statements, or counter allegations in writing, relating to the claim on the one hand and the defence on the other, and following in succession, until by means of them the questions to be decided between the parties are brought out in the form of issues, on which the cause may be tried and decided. The process of pleading is to compel the parties to come to an issue of fact or of law, and the rules of law directed to the mode whereby and the time within which these pleadings or written statements are to be made, irresistibly lead the parties in an action to raise the issues or questions to be decided between them, unless, indeed, either party, at some preliminary stage of the suit, chooses to abandon his claim or defence. Formerly the system or science of special pleading was one of great refinement; its rise and progress have been thus described (*n*): "The manner of allegations in

(i) *Ante*, p. 256.

(k) *Ante*, p. 255.

(l) *Ante*, p. 259.

(m) *Ante*, p. 260.

(n) Stephen on Pleading, 1st ed.
p. 144.

our courts may be said to have been first methodically formed and cultivated as a science in the reign of Edward I. From that time the judges began systematically to prescribe and enforce certain rules of statement, of which some had been established at periods considerably more remote, and others apparently were then from time to time first introduced. None of them seem to have been of legislative enactment, or to have had any authority, except usage or judicial regulation; but from the perception of their wisdom and utility, they acquired the character of fixed and positive institutions, and grew up into an entire and connected system of pleading." But though the system of pleading above spoken of in terms of not unjust eulogy was in some respects of great utility, and had been a valuable auxiliary in building up and settling the law in this country, yet it ran into such refinements and niceties, and was capable of being so much abused, for the purpose of raising purely technical objections, that it was at length deemed expedient to effect a complete change in its rules, and this was mainly done by the Common Law Procedure Act, 1852, which, while it still retained what was useful in pleading—viz., the compelling the parties in an action to come to issue, did so by provisions which, to a great extent, discarded the refinements and niceties that had prevailed, and were directed to matter of substance rather than of form. But though the more subtle rules of pleading have been swept away, it is still only by controlling the time and the manner of their allegations that the parties in an action are brought to issue. Under no system of pleading could the parties be left at large without control to arrange the points of difference between themselves. If they were so, specific issues would seldom be arrived at by persons in so hostile a situation as the plaintiff and the defendant in a suit at law. The parties are, however, under control, both as to the time and the manner of their allegations, and are compelled by the system that prevails in our courts of law so to plead that they must, sooner or

later, arrive at specific issues (*n*). Both the manner of their allegations and the time within which the parties are to make them are accordingly regulated by law and the practice of the courts, and they must proceed in their alternate statements by certain formal stages, under the cognisance and control of the court in which the action may be brought. The plaintiff must, after the appearance of the defendant is entered, declare his complaint. To this declaration of the plaintiff, the defendant, within a certain time, unless he means to let judgment go against him by default, must plead. To this pleading the plaintiff replies, and if either party unduly hesitates and delays to plead, he may be ordered to do so by notice (*o*), at the peril of having judgment signed against him, and so the parties proceed in point of time. Neither is the manner of their allegations uncontrolled. Here steps in the science of special pleading, which is part of the law, and by the rules of which the parties are constrained to limit and point their allegations in such a way that, sooner or later, they arrive inevitably at specific issues, either of fact or of law, at distinct points of dispute, whereby the cause may be tried and decided.

The distinctive names of the successive steps in pleading are as follows:—The statement after appearance, of the cause or causes of action for which the plaintiff sues is called the “declaration;” the defendant’s allegations in answer to the declaration, the “plea;” the plaintiff’s reply to the plea, the “replication” (*p*). To these the defendant may rejoin, and the pleadings may go beyond this stage to surrejoinder, rebutter, surrebutter, &c., according to the exigencies of the case, though at the present day issues of fact are generally arrived at by the replication or the rejoinder. If there are grounds for contending that

(*n*) See Phillips’s Letters on Pleading, 2nd ed., p. 2.

(*o*) C. L. Proc. Act, 1852, s. 53, *post*, p. 331.

(*p*) See the provisions of C. L. Proc. Act, 1852 (s. 81), as to several matters being pleadable at any stage of the pleadings.

any one of these pleadings from the declaration downwards is on the face of it substantially defective, that is to say, does not, on the facts as stated by it, present any real case or any real answer to the pleading which it professes to answer, such pleading may be "demurred" (*q*) to, and joinder in demurrer raises an issue of law, to be argued before the judges. A party, moreover, may now have leave both to plead and demur to the same pleading (*r*).

A leading alteration effected in pleading by the Common Law Procedure Act, 1852, was its doing away with special demurrers, and putting in the place of them a more salutary method of controlling the statements of the parties. Demurrers were formerly divided into two classes, general and special—general where the pleading demurred to was defective in substance, special where the defect was one of form only. If a party in his pleading infringed any rule as to the form of statement, however trivial or unimportant such infringement might be, he was liable at once to be visited by a special demurrer at the will of his opponent. The main rules as to statement in pleading—for example, those against uncertainty, argumentativeness, or doubleness in pleading—so far as they were applied to their legitimate objects, worked well and usefully; but, unfortunately, the smallest infractions of any one of them, though not in the least impeding the course of the cause, or in the least interfering with a decision of it on the merits, were perpetually made subjects of special demurrer, and, in addition to this, many fictitious and needless averments, which admitted of no denial, and on which nothing turned, were required to be made, to satisfy some theory of form only, which had been established to be law. Now, the Common Law Procedure Act, 1852, retained general

(*q*) Demurrer, from the Latin *demorari*, to stay, the party who demurs objecting to go any further, because the other has not shown sufficient matter against him that

he is bound to answer.

(*r*) As to pleading and demurring together, see C. L. Proc. Act, 1852, s. 80.

demurrers, but put an end to special demurrers, substituting for them a controlling power, vested in the court or a judge, to amend or strike out pleadings on the application of the opposite party, if they were so framed as to prejudice, embarrass, or delay the fair trial of the action; and as to needless and fictitious averments, the act swept them away altogether.

We have been above speaking of those general clauses of the act relating to all pleadings at any stage of the cause. The act also contains special provisions relating to particular matters in pleading.

By the provisions as to the language and form of pleadings in general, the following simplifications amongst others have been effected: statements which need not be proved, such as the statement of time, quantity, quality, and value, where these are immaterial, the statement of acts of trespass having been committed with force and arms, and against the peace of our lady the queen, the statement of premises which need not be proved, and all statements of a like kind, are to be omitted (*s*). Also either party may object by demurrer to the pleading of the opposite party that such pleading does not on the face of it set forth sufficient ground of action, defence, or reply, as the case may be; and where issue is joined on such demurrer, the court may proceed to give judgment according as the very right of the cause and matter in law shall appear unto them without regarding any imperfection, omission, defect in or lack of form, and no judgment shall be arrested, stayed, or reversed for any such imperfection, omission, defect in or lack of form (*t*).

No pleading shall be deemed insufficient for any defect which could formerly have been taken by special demurrer only (*u*).

If any pleading be so framed as to prejudice, embarrass, or delay the fair trial of the action, the opposite party

(*s*) C. L. Proc. Act, 1852, s. 49.

(*u*) S. 51.

(*t*) S. 50.

may apply to the court or a judge to strike out or amend such pleading, and the court or a judge may make such order respecting the same, and also respecting the costs of the application, as may seem fit (*x*).

It should here be observed that the Procedure Act of 1852 makes provision for the parties to an action raising questions of fact without any pleadings, if they are agreed as to the question or questions of fact to be decided between them, and this is to be done after writ issued by order of a judge, upon his being satisfied that the parties have a *bonâ fide* interest in the decision of such question or questions, and that the same is or are fit to be tried; but as the basis of this proceeding is the agreement of the litigant parties as to what may be the question or questions to be decided between them, it is not of frequent occurrence. Provision is also made for the parties in an action by consent and order of a judge to state any question or questions of law in a special case for the opinion of the court without any pleadings. It is to be observed that to raise a question of law in a special case the parties must agree upon all the facts, and as it is but seldom that the litigant parties can do this, it is not uncommon for the special case to be referred to some person to settle for the parties, he having power to receive evidence and to determine those facts which are disputed between them (*y*). Provisions are likewise contained in the Common Law Procedure Act, 1854, relating to compulsory references to arbitration by order of the court or a judge, which have been found most valuable in saving the time of the courts, and relieving the parties from unnecessary expense (*z*). An order to refer, though it may be made at a subsequent stage, is frequently made before any pleading in the action. The application to refer is open to either party, and the court or a judge will make such order upon being satisfied that

(*x*) S. 52.

(*z*) C. L. Proc. Act, 1854, ss. 3—

(*y*) C. L. Proc. Act, 1852, ss. 42 17.

the question in dispute involves wholly or in part matters of mere account which cannot be conveniently tried in the ordinary way.

The time within which the parties are compelled to proceed with their pleadings is governed by the provisions of the Procedure Act of 1852, and by the rules of practice relating thereto; the general principle applicable being that either party can be forced on to take the next step in pleading within a certain time, until issue joined, or must abandon his claim or defence, as the case may be. The plaintiff is deemed out of court unless he declare within a year after the writ of summons is returnable, that is, *ipso facto*, without anything being done to force him on by the defendant; but he may be compelled to declare at an earlier period, or submit to a judgment against him which puts an end to the action, and is called judgment of *non pros*. The plaintiff has the whole of the term next after the appearance is entered for declaring, but when that time has expired, on four days' notice being given him, as prescribed by sect. 53 of the Procedure Act of 1852, if he fail to declare within such period, judgment of *non pros* may be signed against him unless he has obtained by judge's order further time to declare. A plaintiff may obtain further time to declare by order of the court or a judge on application made for that purpose, or some order in the cause may suspend the proceedings for a time, and this remark applies not only to declarations but to all the subsequent pleadings and to each party in the cause, *viz.*, that the time may be extended expressly or impliedly by order.

Application for time to plead and respecting very many other matters incidental to the proceedings of either party in the cause are disposed of at judge's chambers by summons and order; the summons is taken out by the party applying and served on his opponent, and in the body of it requires him to attend before the judge to show cause, *ex. gr.* "why the defendant should not have a

week's further time to plead," or as the case may be. These summonses are attended at judge's chambers in some cases before a judge, in others before a master (a) of one of the courts, and the order is drawn up according to the decision, which is usually indorsed on the back of the summons. In many cases the opposing party indorses a consent on the summons, in which case the order is drawn up without attending before the judge.

In order to force on the opposite party (if he delay to proceed) a notice must now be given requiring him "to declare, and reply, rejoin, or as the case may be, within four days, otherwise judgment" (b). Such notice is either delivered separately or indorsed on the pleading to which the opposite party is required to reply, rejoin, or otherwise.

The regular time for pleading in bar to the action, where the defendant is within the jurisdiction, is eight days (c), and in order to compel the defendant to plead, a notice requiring him to do so in eight days, "otherwise judgment," may, whether the declaration be delivered or filed, be indorsed on it, or may be separately delivered (d). A plea in abatement must be pleaded in four days. There are also rules as to the time for pleading after amendment (e); where the amendment of any pleading is allowed no new notice to plead thereto shall be necessary, but the opposite party is bound to plead to the amended pleading within the time specified in the original notice to plead, or within two days after amendment, whichever shall last expire, unless otherwise ordered by a court or judge, and in case the amended pleading has been pleaded to before amendment and is not pleaded to *de novo* within two days after amendment or within such other time as may be allowed, the pleadings originally pleaded thereto

(a) See stat. 30 & 31 Vict. s. 68.

(b) C. L. Proc. Act, 1852, s. 53.

(c) C. L. Proc. Act, 1852, s. 63.

Where the plaintiff seeks to recover a liquidated demand in money,

judgment by default, for want of a plea, is final. *Id.* s. 93.

(d) *Id.* ss. 62, 63.

(e) *Id.* s. 90.

shall stand and be considered as pleaded in answer to such amended pleading.

We have already seen that the plaintiff may have notice given to him to reply, rejoin, or as the case may be, and he must do so on such notice being given him, unless further time is allowed by judge's order. The long vacation, which includes the time between Aug. 10 and Oct. 24 in every year, is excepted from the period of pleading.

As regards the computation of time—in all cases in which any particular number of days not expressed to be clear days is prescribed by the rules or practice of the court, the same are reckoned exclusively of the first day and inclusively of the last day, unless the last day shall happen to fall on a Sunday, Christmas-day, Good Friday, or a day appointed for a public fast or thanksgiving, in which case the time is reckoned exclusively of that day also; the days between Thursday next before and the Wednesday next after Easter-day and Christmas-day and the three following days are not reckoned or included in any rules, notices, or other proceedings in general, except notices of trial or notices of inquiry (*f*).

In any cause in which there have been no proceedings for one year from the last proceeding had, the party, whether plaintiff or defendant, who desires to proceed, is required to give a calendar month's notice to the other party of his intention so to do (*g*).

Supposing, however, the pleadings to proceed, the declaration must (as also must every other pleading) be entitled of the proper court, that is to say, the court in which the action is brought, and of the day and the month of the year when the same was pleaded (*h*), and a

(*f*) See Rules Hil. T. 1853, *reg.* 174, 175.

(*g*) *Reg.* 176.

The summons of a judge, if no order be made thereupon, is not to

be deemed a proceeding within this rule. Notice of trial, though afterwards countermanded, shall be deemed a proceeding within it.

(*h*) C. L. Proc. Act, 1852, s. 54.

venue must be stated in the margin, being the county where the action is to be tried. A formal commencement and a conclusion are also prescribed for the declaration (i).

The venue laid in the declaration is either transitory or local; local where the cause of action is of such a nature that it could only have arisen in a particular place or county, and transitory where it might have arisen anywhere. Thus, in an action for an injury to real property, the venue is local; while in an action for debt or breach of contract, which is "*nullius loci*," and for an injury to the person or personalty, it is transitory.

Such is the general distinction in regard to venue. It should however be observed that sometimes, though the cause of action is fixed to no locality within the meaning of the above definition, the venue is nevertheless required to be local, *ex. gr.*, where it is made so by statute. Where the venue is transitory it may be laid in any county, subject to its being changed by order of a judge on special grounds. Where local, it must be laid in the county where the cause of action arose, but the court or a judge may allow a suggestion to be entered for the trial of the cause in a county other than that in which the venue is laid.

After the formal commencement of the declaration, the statement of the cause of action follows. It is not, as one unacquainted with legal proceedings might imagine, a narrative of all the circumstances of the case out of which the complaint has arisen, but it is a statement of such facts only as are essential to constitute a cause of action on the part of the plaintiff against the defendant. In pleading, the legal effect and operation of things is looked

(i) Every declaration shall commence as follows, or to the like effect: [Venue] "A. B. by E. F. his attorney [or 'in person,' as the case may be,] sues C. D. for (here state the cause of action);" and

shall conclude as follows, or to the like effect: "And the plaintiff claims £— (or if the action is brought to recover specific goods, the plaintiff 'claims a return')." C. L. Proc. Act, 1852, s. 59.

at ; what is matter of evidence merely is reserved for the trial, and all that is required in a declaration, therefore, is that it should state in an accurate and traversable (*j*) manner those facts which constitute the cause of action against the defendant. This statement may be sometimes made shortly and in general terms with the aid of language of legal import, and sometimes by a more extended statement, but should always be made without unnecessary detail or prolixity.

The following examples, to show the mode of declaring, may be adduced :—A merchant applies to a manufacturer to supply him with cotton prints ; a correspondence ensues as to the price to be given for the goods, the quality of the wares, the time during which they are to be supplied, and the period of credit to be allowed for payment. The terms of the contract are at length adjusted. The goods are sent and received by the merchant, and the period of credit has expired, but he fails to pay the price for them, and an action is commenced against him. Now the cause of action arising out of the above facts would be briefly stated in the declaration to be for “ money payable by the defendant to the plaintiff for goods sold and delivered by the plaintiff to the defendant ” (*k*). If this cause of action were denied, and the terms of the contract were disputed, with a view to reducing the amount charged, or for any other reason, the facts and circumstances of the case, including the correspondence, would be proved at the trial, the pleadings presenting in the simplest form the issue as to which the evidence would be given.

Again, a horse was sold at a fair after much bargaining,

(*j*) That is, capable of being denied or put in issue.

(*k*) The above belongs to a class of counts called the common counts or money counts, of which several examples are given in Schedule (B.) to the Com. Law Proc. Act, 1852.

They used to be called the “ *indubitatus* counts,” because they begun by stating that the defendant was indebted to the plaintiff, for which, the words “ money payable by the defendant to the plaintiff ” are now substituted.

in the course of which the seller said that the horse was sound, and quiet to ride. Now every affirmation at the time of the sale of a personal chattel is a warranty, provided it be so intended, and whether it was so intended or not, in the case put, would be a question for the jury on evidence of the circumstances attending the sale, and of what then took place between the parties; the buyer, however, in suing the seller for breach of warranty, would in his declaration simply state "that the defendant by warranting a horse to be then sound and quiet to ride, sold the said horse to the plaintiff, yet the said horse was not then sound and quiet to ride," it being for the jury to decide, if the warranty were denied by an apt plea, whether the statements made by the seller at the time of the sale were intended as a warranty or not.

Again, plaintiff sues defendant for not loading the plaintiff's ship pursuant to a charter-party. Such a case might involve many details, yet the statement of the cause of action would be made in the following form, without any superfluous narration:—"That the plaintiff and defendant agreed by charter-party that the plaintiff's ship, called the 'Ariel,' should with all convenient speed sail to R., or so near thereto as she could safely get, and that the defendant should there load her with a full cargo of tallow or other lawful merchandise, which she should carry to H., and there deliver, on payment of £—— per ton, and that the defendant should be allowed ten days for loading, and ten for discharge, and ten days for demurrage if required, at £—— per day, and that the plaintiff did all things necessary on his part to entitle him to have the agreed cargo loaded on board the said ship at R., and that the time for doing so had elapsed, yet the defendant made default in loading the agreed cargo;" the terms set forth in the declaration corresponding with those of the charter-party.

The above forms of declaration relating exclusively to contracts, an instance may next be given of a declaration

for wrong, independent of contract. In an action for diverting a watercourse from a mill, the declaration might allege:—"That the plaintiff was possessed of a mill, and by reason thereof was entitled to the flow of a stream for working the same, and the defendant, by cutting the bank of the said stream, diverted the water thereof away from the said mill." It is impossible to read the above form without perceiving that it is framed with the extremest brevity, and so as to invite clear and simple issues on the main points likely to arise in such an action; as for instance, on the pleas of not guilty, and a denial of the right asserted by the plaintiff, and, issues being joined on these pleas, a mass of evidence, oral and documentary, reserved for the occasion when it could be once for all best investigated, viz., on the trial of the cause, might be forthcoming.

Statutory forms (*l*) such as the foregoing, which are models of clearness and comprehensive brevity, should always be followed, as far as the particular circumstances of the case may admit. It is, indeed, expressly provided (*m*) that they shall be sufficient, and may be used, with needful modifications. Sometimes, however, it may be advisable to plead at length, instead of using a more concise form. Thus it is an old rule of pleading that the legal operation and effect of a written instrument should be stated, but there are cases in which it may be advisable to set out the whole instrument in words and figures from the beginning to the end; for instance, a deed may, if a particular construction is put upon it, give the plaintiff a cause of action against the defendant, and the construction of any part of the deed may depend on a nice consideration of all its terms. The plaintiff in such case may think proper to set out the whole deed, whatever be its length, in his pleading, in order to bring it at once before the court, and thus give the defendant an opportunity of raising the question by

(*l*) C. L. Proc. Act, 1852, Sched. (B.).

(*m*) C. L. Proc. Act, 1852, s. 91.

demurrer, whether on a true construction of the deed there is a cause of action or is not.

The declaration must omit no allegation that is material to the cause of action. Thus a declaration against a defendant for breach of a contract by him to do certain work for the plaintiff in a careful and proper manner, would, if the contract were not under seal, be bad in substance, unless it stated a consideration for the defendant's undertaking.

One or two remedial provisions relating to declarations may here specially be noticed. A difficulty in pleading formerly existed in declaring on the breach of an executory contract, from the necessity of stating the fulfilment or an excuse for the non-fulfilment of every condition precedent to the defendant's obligation to perform it. Now, it was often difficult to say whether particular stipulations were conditions precedent or not, and especially where no stress had been laid upon them as such between the parties. In declaring for breach of a contract containing many clauses, and having long specifications attached to it, it was necessary to pick out of the contract every stipulation that might be held to be a condition precedent, whether it concerned an act to be done, an act to be omitted, or an event to happen, and precisely and separately to aver the performance of it, or an excuse for its non-performance. Hence much perplexity was sometimes caused, and, to remedy the evil adverted to, it has been provided that "it shall be lawful for the plaintiff or defendant in any action to aver performance of conditions precedent generally, and the opposite party shall not deny such averment generally, but shall specify in his pleading the condition or conditions precedent, the performance of which he intends to contest" (n).

Again, formerly in an action for libel and slander, where the words or matter complained of were actionable only

(n) C. L. Proc. Act, 1852, s. 57.

with reference to extrinsic circumstances, it was necessary to state such extrinsic circumstances in the declaration by way of prefatory averment. It was often a difficulty to know how much or how little to state of the circumstances, or in what way to put them, as a matter of pleading, to support the inuendo or meaning attached to the words or matter in a subsequent part of the declaration. If the prefatory averment did not support the meaning attached, with almost logical exactitude, the whole declaration might have been held to be bad. To remedy this s. 61 (o) of the Common Law Procedure Act, 1852, has enacted that, "in actions for libel and slander, the plaintiff shall be at liberty to aver that the words or matter complained of were used in a defamatory sense, specifying such defamatory sense without any prefatory averment to show how such words or matter were used in that sense, and such averment shall be put in issue by the denial of the alleged libel or slander; and where the words or matter set forth, with or without the alleged meaning, show a cause of action, the declaration shall be sufficient."

Inasmuch as each of the money counts (*p*) is worded in very general terms, and may include several transactions (for instance, the count for "goods sold" may relate to several sales of goods), it is deemed proper that the defendant should be informed as to the items of the plaintiff's claim, and the plaintiff, accordingly, is required to deliver or file with every declaration (*q*), unless the writ of summons has been specially indorsed, full particulars of his demand under such claim (*r*). There are also copious

(o) Which should be read in connection with the appropriate forms in Schedule (B.)

(p) *Ante*, p. 334 (*k*).

(q) *i. e.*, with every declaration containing causes of action such as those set forth in the C. L. Proc. Act, 1852, Sched. (B.), and numbered from 1 to 14 inclusive.

(r) See Rules Hil. Term, 1853; reg. 19, 20, 21, relating to particulars of demand, and also to particulars of set-off with the plea of set-off. These particulars are very usually a short business-like statement in the form of an account, with dates of the different items claimed.

statutory provisions in certain other cases as to particulars; and particulars, also, may be obtained by means of a judge's order, on special grounds, in cases where they are not ordinarily given.

Though several causes of action may be conjoined in one declaration, the court or a judge has power to strike out or amend, on application made for that purpose, counts founded on the same cause, and thus to prevent a useless and inconvenient repetition of the same grounds of claim, with a difference of form merely. Indeed, the rules of Trinity Term, 1853, make express provision against the unnecessary repetition, not only of counts, but of pleas and subsequent pleadings. Thus, reg. 1 directs that (except as afterwards provided) several counts on the same cause of action shall not be allowed, and any count or counts used in violation of this rule may, on the application of the party objecting, within a reasonable time, or before an order made for time to plead, be struck out or amended by the court or a judge, on reasonable terms. Reg. 2 also provides that "several pleas, replications, or subsequent pleadings, or several avowries or cognizances (s) founded on the same ground of answer or defence, shall not be allowed, provided that, on application made to strike out any count, or objection taken to the allowance of several pleas, replications, or subsequent pleadings, avowries, or cognizances, as being in violation of this rule, the court or judge may allow such of them, though founded on the same ground of answer or defence as may appear to be proper for determining the real question in controversy between the parties, on its merits, subject to reasonable terms." Moreover, "when on the trial of a cause (no rule or order having been previously made as to costs) there is more than one count, plea, replication, or subsequent pleading, avowry, or cognizance, on the record

(s) Pleadings in replevin, accounting of the goods, *ante*, p. 261. knowledge, and justifying the

founded on the same cause of action, or ground of answer or defence, the judge before whom the cause is tried may certify to that effect on the record, thereby making the party who has so pleaded liable for the costs thus uselessly incurred (*t*).

Pleas are either in abatement or in bar; a plea in abatement does not profess to answer the claim on the merits, but seeks to abate the action on the ground of some defect or informality in its inception, which disentitles the plaintiff to sue. The only plea in abatement much known in practice is that of non-joinder of co-defendants. If such a plea were well founded, it formerly had the effect of quashing the writ and declaration in the particular action. It gave the names of those who ought to have been joined as defendants, and the plaintiff had to commence a fresh suit against all who should have been joined. It was accordingly said to give the plaintiff a better writ. Now, however, statutory provisions have rendered it unnecessary to commence the action *dè novo* after a successful plea of non-joinder—the writ and declaration being amendable by inserting in them the names of the defendants who ought to have been originally joined (*u*). The plea in abatement has to be verified by affidavit, and must state that the person or persons whose non-joinder is pleaded are resident within the jurisdiction of the court, and the place of residence must be stated with convenient certainty in the affidavit verifying the plea.

Pleas in bar are pleaded to the plaintiff's claim on the action. They may seek to meet the cause of action allowed in the declaration either by denial or by some other

(*t*) Rules Trin. T. 1853, *reg.* 3.

The C. L. Proc. Act, 1852, enacts (s. 86), that all objections to the pleading of several pleas, replications, or subsequent pleadings, or several avowries or cognisances, on

the ground that they are founded on the same ground of answer or defence, shall be heard upon the summons to plead several matters.

(*u*) C. L. Proc. Act, 1852, ss. 38, 39.

answer, showing that the plaintiff has no right to maintain the action against the defendant. Pleas in bar are broadly divided into pleas in denial and pleas in confession and avoidance. Such a plea may deny or traverse one or more of the material allegations in the declaration, or it may admit the case as there stated, and bring forward new matter in answer to it. Let us suppose that the plaintiff, the drawer of a bill of exchange, declared against the defendant as acceptor of the bill. A plea that he (the defendant) did not accept the bill would be a plea in denial or traverse of the acceptance as alleged. A plea that before action the defendant had satisfied and discharged the plaintiff's claim by payment would be a plea in confession and avoidance. The latter plea would admit the bill to have been accepted by the defendant, and that a complete cause of action had accrued against him, but would avoid it by matter subsequent, *viz.*, payment in discharge. It is not, however, essential to a plea in confession and avoidance that it should admit a cause of action to have once accrued. If the plea admit the *prima facie* case stated in the declaration, it would still be so designated, although the new matter brought forward by it should go to show that there never was a cause of action against the defendant in respect of the matter declared on. Thus, in an action on a bill of exchange, if the defendant pleaded that it was given for an illegal consideration (stated in the plea), that would confess the drawing and acceptance, but show the bill to have been invalid *ab initio*, as between drawer and acceptor. In an action for diverting a watercourse, were the defendant to plead not guilty and also that the defendant diverted the watercourse in the lawful exercise of a prescriptive right at particular times to irrigate his meadow, the first plea would be that form of denial called the "general issue," while the second plea would be in justification of the act complained of, and show that no cause of action had ever existed in respect of it; still it

would admit the diversion in point of fact, and be described as a plea in confession and avoidance. At a period now somewhat remote (*u*), such justification could have been given in evidence under the plea of "not guilty," or "the general issue."

With regard to the "general issue," some explanation may here be proper. The term is still in use, though the operation and effect of the plea was greatly limited by the rules of Hil. Term, 4 Wm. 4, and again by the rules of Trin. Term, 1853. In form the general issue may perhaps be described as a denial of such allegations as constitute the characteristic or leading feature of the claim. Thus, in "promises" it would be "*non assumpsit*," in case and trespass, "not guilty," in detinue, "*non detinet*," "*Nil debet*" was formerly the general issue in debt, but is now no longer allowed (*x*). The evidence admissible under the general issue, or in other words, the defences let in by it formerly varied in extent in different actions; in the majority of cases, however, this plea had the effect not only of denying the facts stated in the declaration, but of letting in evidence appropriate to pleas in confession and avoidance. It is needless to particularise with precision what was admissible under the general issue before the rules of Hil. Term, 4 Wm. 4, as its operation is now regulated by the rules of Trin. Term, 1853, from which the following propositions with examples and illustrations of them have been taken:—

1. In any action on simple contract (except as presently specified) the plea of *non assumpsit*, or a plea traversing the contract or agreement alleged in the declaration, operates only as a denial in fact of the express contract, promise, or agreement alleged in the declaration, or of the matter of fact from which it may be implied by law (*y*). *Ex. gr.* In an action on a warranty such plea will operate

(*u*) Namely, before the Rules, Hil. Term, 4 Will. 4.

(*x*) Rules, Trin. T. 1853, *reg.* 11.
(*y*) *Reg.* 6.

as a denial of the fact of the sale and warranty having been given, but not of the breach; and in an action on a policy of insurance of the subscription to the alleged policy by the defendant, but not of the interest, of the commencement of the risk, of the loss, or of the alleged compliance with warranties (*x*). In an action against a carrier or other bailee for not delivering or not safely keeping goods, or not returning them on request, and in an action against an agent for not accounting, such plea will operate as a denial of any express or implied contract to the effect alleged in the declaration, but not of the breach.

To any cause of action to which the plea of "never was indebted" is applicable (*a*), and to any of a like nature, the plea of "*non assumpsit*" is now inadmissible, and the plea of "never was indebted" operates as a denial of those matters of fact from which the liability of the defendant arises; *ex. gr.*, in an action for goods bargained and sold, or sold and delivered, the plea will operate as a denial of the bargain and sale, or sale and delivery in point of fact; in an action for money had and received it will operate as a denial both of the receipt of the money and of the existence of those facts which make such receipt by the defendant a receipt to the use of the plaintiff (*b*).

In an action upon a bill of exchange or promissory note, the plea of "*non assumpsit*" and "never indebted" is inadmissible. In any such action, therefore, a plea in denial must traverse some matter of fact; *ex. gr.*, the drawing, making, indorsing, accepting, presentment, or notice of dishonour of the bill or note (*c*).

2. In every species of action on contract, all matters in confession and avoidance, including not only those by way of discharge, but those which show the transaction to be

(*x*) *Ante*, pp. 212, *et seq.*

1852.

(*a*) As provided in Schedule (B.)
(No. 36) of the C. L. Proc. Act,

(*b*) *Reg.* 6.

(*c*) *Reg.* 7.

either void or voidable in point of law on the ground of fraud or otherwise, must be specially pleaded; *ex. gr.*, infancy, coverture, release, payment, performance, illegality of consideration, either by statute or common law, drawing, indorsing, accepting, &c., a bill or note by way of accommodation, set-off, mutual credit, unseaworthiness, misrepresentation, concealment, deviation, and various other defences must be pleaded (*d*).

3. In an action on a specialty or covenant, the plea of "*non est factum*" operates as a denial of the execution of the deed in point of fact only, and any other defence must be specially pleaded, including matters which make the deed absolutely void as well as those which make it voidable (*e*). In such an action matter in confession and avoidance must also be pleaded specially (*f*).

4. In an action for tort, the plea of not guilty operates as a denial only of the breach of duty or wrongful act alleged to have been committed by the defendant, but not of the facts stated in the inducement, and no other defence than such denial is admissible under that plea; all other pleas in denial must take issue on some particular matter of fact alleged in the declaration (*g*). *Ex. gr.*, in an action for a nuisance to the occupation of a house by carrying on an offensive trade, the plea of not guilty will operate as a denial only that the defendant carried on the alleged trade in such a way as to be a nuisance to the occupation of the house, and will not operate as a denial of the plaintiff's occupation of the house. In an action for obstructing a right of way, such plea will operate as a denial of the obstruction only, but not of the plaintiff's right of way. In an action for slander of the plaintiff in his office, profession, or trade, the plea of not guilty will operate in denial of speaking the words, of speaking them maliciously, and in the defamatory sense imputed, and

(*d*) *Reg.* 8.

(*e*) *Reg.* 10.

(*f*) *Reg.* 12.

(*g*) *Reg.* 16.

with reference to the plaintiff's office, profession, or trade, but it will not operate as a denial of the fact of the plaintiff holding the office, or being of the profession or trade alleged. In an action for an escape, the plea of the general issue will operate as a denial of the neglect or default of the sheriff or his officers, but not of the debt, judgment, or preliminary proceedings. And in an action against a carrier, the same plea will operate as a denial of the loss or damage, but not of the receipt of the goods by the defendant as a carrier for hire, or of the purpose for which they were received.

Thus much as to the effect of the plea of not guilty generally. It may be proper to add that in an action for trespass to land, this plea operates as a denial that the defendant committed the trespass alleged in the place mentioned, but not as a denial of the plaintiff's possession, or right of possession of that place, which, if intended to be denied, must be traversed specially (*h*). That in an action for taking, damaging, or converting the plaintiff's goods, the plea of not guilty operates as a denial of the defendant having committed the wrong alleged by taking, damaging, or converting the goods mentioned, but not of the plaintiff's property therein (*i*). And that in an action for detaining goods, the plea of *non detinet* operates as a denial of the detention of the goods by the defendant, but not of the plaintiff's property therein; and no other defence than such denial is admissible under that plea (*k*). A defendant sued in tort is sometimes empowered by statute to plead the general issue, and to give the special matter of defence in evidence under it, and in any such case he is required to insert in the margin of his plea a reference to the particular enactment upon which he relies, otherwise such plea will be taken not to have been pleaded by virtue of any act of parliament; and such memorandum is afterwards in-

(*h*) *Reg.* 19.(*i*) *Reg.* 20.(*k*) *Reg.* 15.

serted in the margin of the issue and of the *nisi prius* record (*l*).

The *nisi prius* record is the record made upon parchment for the purpose of the trial, showing the pleadings and issues joined, and delivered to the proper officer of the court in which the cause is to be tried.

5. In an action of tort, as in an action of contract, all matters in confession and avoidance must be specially pleaded (*m*).

6. The last of the pleading rules to be here noticed, applies to all actions by and against the assignee of a bankrupt or insolvent, or by an executor or administrator, or by a person authorised by act of parliament to sue or be sued as a nominal party, and directs that the character in which the plaintiff or defendant is stated on the record to sue or be sued shall not in any such case be considered as in issue unless specially denied (*n*).

In answer to the declaration, or other subsequent pleading of the plaintiff, a defendant may, by leave of a judge (*o*), plead as many several matters as he shall think necessary for his defence, upon an affidavit if required to the effect that he is advised and believes that he has just ground to traverse the several matters proposed to be traversed by him, and that the several matters sought to be pleaded by him by way of confession and avoidance are respectively true in substance and in fact (*p*). In general, however, leave to plead several matters to the declaration is allowed or disallowed by a judge on consideration of the nature of the different pleas as appearing on the face of them, no affidavit such as above mentioned being required; the object aimed at is to get a clear statement of each defence intended to be relied on, and leave it to be tested on issue joined on the evidence adduced at the trial.

(*l*) Reg. 21.

(*m*) Reg. 17.

(*n*) Reg. 5.

(*o*) C. L. Proc. Act, 1852, s. 81.

(*p*) There is no similar provision in s. 81 with regard to plaintiffs,

By sect. 84 of the Common Law Procedure Act, 1852, the following pleas, or any two or more of them, may be pleaded together as of course, without leave of the court or a judge, viz., a plea denying any contract or debt alleged in the declaration, a plea of tender as to part, a plea of the statute of limitations, set-off, bankruptcy of the defendant, *plene administravit*, *plene administravit præter*, infancy, coverture, payment, accord and satisfaction, release, not guilty, a denial that the property, an injury to which is complained of, is the plaintiff's, leave and licence, son assault demesne, and any other pleas which by rule or order may from time to time be added to the foregoing list.

Of the pleas above designated some few may be thought to need a brief explanatory notice. A plea of "the statute of limitations" is applicable where the action has not been brought within a certain time after accrual of the cause of action, limited by statute; for example, if the action be brought on a simple contract, such a plea would be that the alleged cause of action did not accrue within six years before suit (*q*); or, if on a specialty, not within twenty years prior thereto (*r*). The plea of "*plene administravit*" is applicable where an executor or administrator would set up in answer to a claim against him that he has fully administered the assets of the testator or intestate. The plea of "*plene administravit præter*" applies where this defence is relied on by a personal representative, that he has administered all but a certain portion of the assets, the amount of which he either pays into court or meets by some outstanding claim of a higher nature than the

but there is a general provision applicable both to plaintiff and defendant that the costs of any issue, either of fact or law, shall follow the finding or judgment upon such issue.

(*q*) 21 Jac. 1, c. 16, s. 3, which

is the principal statute of limitations as regards personal actions. It has been amended in various respects by the 4 Ann. c. 16, ss. 17—19; 9 Geo. 4, c. 14, ss. 1—4, 6; 19 & 20 Vict. c. 97, ss. 9—14.

(*r*) 3 & 4 Will. 4, c. 42, s. 3.

plaintiff's. The plea of son assault demesne is where the defendant in an action for assault pleads that the plaintiff first assaulted the defendant, who thereupon necessarily committed the alleged assault in his own defence.

Payment into court is a plea of great practical importance, and may be pleaded in any action except for assault, battery, false imprisonment, libel, slander, malicious arrest, malicious prosecution, or debauching the plaintiff's daughter or servant (s). Various statutes specially provide for payment into court in particular cases, as for instance, under Lord Campbell's Act (9 & 10 Vict. c. 93), and 27 & 28 Vict. c. 95, s. 2, relating to actions for compensation to the family of a person killed by accident. Further, a plea of apology and payment into court is allowed under 6 & 7 Vict. c. 96, in certain actions for libel. The Common Law Procedure Act, 1860, s. 25, also contains provisions as to payment into court in actions on money bonds and for detainer. No other plea besides that of payment into court can, however, be pleaded with it to the same part of the declaration.

The plea of payment of money into court admits a cause of action, and brings the money into court in satisfaction of the matter pleaded to. The practical effect, however, of the plea of payment into court, as an admission, varies very much with the nature and form of the declaration to which it is pleaded. For example, to a declaration for breach of a contract, where the contract is specially declared on, it would admit the contract as stated, and the breach to which it was pleaded; but to a declaration containing the common money counts, each of which may include several contracts under its general terms, such as money lent, goods sold, work done at different times, the plea of payment into court as to part of the money claimed may be pleaded, and never indebted to the residue; the effect of the admission by the former plea in such case not

(s) C. L. Proc. Act, 1852, s. 70.

amounting to more than that on some contract or other of the kind mentioned in the declaration money is due to the amount of the sum paid into court. An *indebitatus* count, as we have before observed (*t*), is not necessarily confined to one contract, but may extend to an indefinite number of contracts between the parties to the action; and when, therefore, the defendant pays money into court on such a count, he in effect says to the defendant, I admit that I owe you the sum paid into court upon some contract which may be comprehended in your count, but if you say I owe you more on any contract, prove that contract. So payment of money into court to a declaration upon a special agreement, admits the contract and the breach, for since the declaration contains but one contract, the payment into court must admit that contract by which alone anything is claimed to be due from the defendant to the plaintiff (*u*).

So in an action of tort the declaration may be so framed as to make a payment of money into court an admission of the particular cause of action sued for, and also of the breach. The payment of money into court in such an action may, according to the form of the declaration, be subject either to the rule applicable to special contracts, or to the rule applicable to the general *indebitatus* counts, as above stated.

Application to plead several matters is made by taking out a summons before a judge at chambers, calling on the plaintiff to show cause why the defendant should not be at liberty to plead the several matters annexed, and an abstract of the proposed plea is annexed to the summons. The same method is pursued in asking for leave to plead or demur, and also as to the subsequent pleadings where several matters have to be replied, and so forth.

Equitable defences were first allowed to be pleaded in

(*t*) *Ante*, p. 338.

(*u*) *Per Jervis, C. J., Perren v.*

Monmouthshire R. C., 11 C. B. 858,
862—3.

actions at law by the Common Law Procedure Act, 1854. By sect. 83 of that act, it is lawful for a defendant or the plaintiff in replevin in any cause in which, if judgment were obtained, he would be entitled to relief against such judgment on equitable grounds, to plead the facts which entitle him to such relief by way of defence, and such defence may accordingly be received by way of plea, provided that it begin with the words "for defence on equitable grounds," or words to the like effect. Sect. 84 relates to grounds of equitable defence arising after the period for pleading has elapsed. Sect. 85 relates to equitable replications, and sect. 86 provides that in case it shall appear that any such equitable plea or equitable replication cannot be dealt with by a court of law, so as to do justice between the parties, the same may be struck out, on reasonable terms.

As regards the construction of the above sections it is now settled that the plea setting up a defence on equitable grounds must state such facts as would entitle the defendant to an unconditional injunction in equity, that is to say, he must show such a case as would induce a court of equity at once unconditionally to restrain the plaintiff from proceeding at law. The object of the enactment which gave effect to equitable pleas in a court of law was to enable a defendant instead of filing a bill in equity to restrain the plaintiff from proceeding at law, at once to plead the matter which would have entitled him to equitable relief, as an answer to the action. But one of the earliest restrictions imposed on the use of equitable pleas by the courts of law was that, unless the effect of the plea was to furnish a complete answer to the action and terminate the litigation, it should not be allowed (*x*).

The replication follows the plea; and at this stage of the proceedings issue is very commonly joined between the parties—either issues of law, of fact, or of both.

(*x*) *Wakley v. Frogatt*, 2 H. & C. 669.

An issue in law is arrived at by joinder in demurrer, the demurrer stating simply that the declaration "is bad in substance;" in the margin of his demurrer the plaintiff has, however, to specify some substantial matter of law intended to be argued, and if he omit to do so, or if the ground stated be frivolous, the demurrer may be set aside. Supposing the demurrer to stand, the joinder of demurrer would be to the effect that the pleading demurred to "is good in substance," and would complete the issue of law to be tried by the court (*x*).

Joinder of issue of fact may be effected by either party pleading in answer to the plea or subsequent pleading of his adversary that he joins issue thereon (*y*), and such form of joinder of issue is to be deemed to be a denial of the substance of the plea or other subsequent pleading and an issue thereon, and in all cases where the plaintiff's pleading is in denial of the pleading of the defendant or some part of it, the plaintiff may add a joinder of issue for the defendant. A party is not, however, obliged in proceeding to issue to deny the whole of his adversary's pleading; he may, if he prefers it, traverse separately any material allegation in such pleading (*z*).

We have before said that an issue of fact is commonly arrived at by the time the replication is reached, the plaintiff joining issue on the pleas; but it may be requisite for the plaintiff's case (and the same remark would apply to either party at any of the subsequent pleadings), that he should reply in confession and avoidance of the plea instead of joining issue; and to a plea in confession and avoidance the defendant would have to rejoin, or the plaintiff might desire to join issue, or separately to traverse one or more material allegations in the plea, and also to reply in confession and avoidance, in which case he would have to obtain leave of a judge for that purpose. Thus the plaintiff would apply for leave to

(*x*) C. L. Proc. Act, 1852, s. 89.

(*z*) *Id.* ss. 76—78.

(*y*) *Id.* s. 79.

reply to several matters in the following case : suppose an action to be brought for goods sold and delivered by the plaintiff to the defendant, and the defendant to plead that at the time of making the contract he was an infant within the age of 21 years, and suppose the defendant at the time of the action brought to be of age, and that it is doubtful whether he was not so at the time of making the contract, such question might be raised by the plaintiff's joining issue on the plea. But the plaintiff may also have grounds for contending that if the defendant were an infant at the time of the contract, the goods supplied were necessaries for the defendant suitable to his then estate, degree, and condition, and in such case he would reply in confession and avoidance of the plea that they were such necessaries (a). Again, there may have been before action some correspondence between the plaintiff and the defendant after the defendant came of age, and it may be a question on such correspondence whether the defendant has not ratified the contract, in which case the plaintiff would wish to plead also that the defendant after he had attained his full age of 21 years and before action, by a writing made and signed by him, ratified and confirmed the said contract. These replications containing distinct grounds of answer to the defendant's plea, would no doubt be allowed almost as of course on the plaintiff taking out a summons calling on the defendant to show cause why he should not be at liberty to reply the several matters specified in the abstract annexed to the summons, and such abstract might be in this form : 1. Joinder of issue ; 2. That the goods were necessaries ; 3. Ratification of the contract by the defendant after he came of age.

During the progress of a cause there are many proceedings of an auxiliary character which the law allows to the parties in furtherance of justice and in aid of their preparations for the trial. Of such proceedings some

(a) See *Ryder v. Wombwell*, L. R. 4 Ex. 32.

relate to the discovery and inspection of documents and the delivery of written interrogatories. A power to order inspection of documents was sometimes exercised by a court of law before the passing of the statute 14 & 15 Vict. c. 99, but by s. 6 of that act it was extended to all cases in which equity would order a discovery, it being thereby provided that the court or a judge might, on application made for such purpose by either of the litigants, in an action or other legal proceeding, compel the opposite party to allow to the applicant an inspection of all documents in his custody or under his control relating to the action. Such power being exerciseable in all cases in which, previous to the passing of that act, a discovery might have been obtained by filing a bill, or by any other proceeding in a court of equity at the instance of the party making the application. The provisions referred to, it must be observed, do not give power to compel discovery, but are confined to inspection merely; they were, however, shortly followed by those contained in sect. 50 of the Common Law Procedure Act, 1854, enacting that, upon the application of either party to any cause or other civil proceeding in any of the superior courts, upon an affidavit by such party of his belief(*b*) that any document to the production of which he is entitled for the purpose of discovery or otherwise is in the possession of the opposite party, the court or a judge may order that the party against whom such application is made, or if such party is a body corporate, that some officer thereof shall state on affidavit what documents are in his or their possession or power relating to the matters in dispute, or what he knows as to the custody of them, and whether, and if so, on what grounds, the production of such documents as are in his or their possession or power is objected

(*b*) The applicant must show by his affidavit that his adversary has some one document in his posses-

sion to the production of which he is entitled. *Evans v. Louis*, L. R. 1 C. P. 656.

to, and thereupon the court or judge may make such further order as shall be just.

The above enactments being directed to the compelling of inspection of documents upon the grounds which would move a court of equity to order it, we may add that the right of a plaintiff in equity is limited, first, to a discovery confined to questions in the cause, *i.e.* of such material documents as relate to the proof of his (the plaintiff's) case on the trial, and does not extend to the discovery of the manner in which the defendant's case is to be established, or to evidence which relates exclusively to his case. The party applying, therefore, to a court of law for an order to inspect, who is in the same situation as a plaintiff in equity, must show, first, what is the nature of the suit, and the question to be tried in it; and it seems also that he should depose, in his affidavit, to his having just ground to maintain or defend it: secondly, the affidavit ought to state, with sufficient distinctness, the reason of the application, and the nature of the documents, so that it may appear that an inspection of the documents is asked for the purpose of enabling the applicant to support his own case, not to find a flaw in that of his opponent; and so that the opponent may admit or deny the possession of them. To this affidavit the opponent may answer, by swearing that he has no such documents, or that they relate exclusively to his own case, or that he is, for some sufficient reason, privileged from producing them; or he may submit to show parts, covering the remainder, on affidavit that the part concealed does not in any way relate to the plaintiff's case (*c*).

As ancillary to the procedure by action must be mentioned the statutory provisions concerning interrogatories (*d*). A litigant party may now be entitled, by order of the court or a judge, to deliver to the opposite party or

(*c*) *Hunt v. Hewitt*, 7 Exch. 244.

(*d*) C. L. Proc. Act, 1854, ss.

51—53.

his attorney (provided such party, if not a body corporate, would be liable to be called and examined as a witness upon such matter), interrogatories in writing upon any matter as to which discovery may be sought, and require such party, or, in the case of a body corporate, any of the officers of such body corporate, within ten days to answer the questions put by affidavit, to be sworn and filed in the ordinary way (*e*). The application for leave to deliver interrogatories is usually disposed of on summons before a judge at chambers, who, on production of the proposed interrogatories when the summons is heard, determines in the first instance whether they are such as ought to be allowed or not.

The courts have a general discretion as to the allowance of interrogatories, though they will be guided in exercising it by the principles on which discovery is allowed in equity. Much doubt has however existed as to whether interrogatories can be put the answers to which might tend to criminate the party interrogated. The only intelligible rule upon the subject deducible from the cases seems to be, that when the interrogatories are *bonâ fide* framed for the purpose of discovery, and are relevant to the matter in issue, they may be allowed, although the answers to them may, if answered in one way, tend to criminate the party answering, leaving to such party the option of refusing to answer upon that ground. But where such interrogatories are sought to be put, the court or the judge at chambers will require a stronger case to be made out for allowing them than is ordinarily requisite, and such interrogatories will not be allowed on the common affidavit only, but some special circumstances must be laid before the judge to induce him to order them (*f*).

We proceed to give some account of an ordinary trial of The trial.

(*e*) S. 52 states the nature of the affidavit to be made by and on behalf of the party proposing to interrogate in support of his appli-

cation for leave to do so.

(*f*) Day, C. L. Proc. Acts, 3rd ed., pp. 257, 259, 260; *Villeboisnet v. Tobin*, 38 L. J. C. P. 150.

a cause on issues of fact (*f*). If there is an issue of law, it is set down for argument at the request of either party, and the demurrer book containing the demurrer, the joinder in demurrer, and the pleadings to which they relate, has to be made up and delivered to the judges as prescribed by the rules of practice (*g*), and the case then comes on for argument in due course before the court. In the case of issues of fact, the plaintiff makes up "The Issue," as it is termed, in the form (*h*) given by the practice rules, which states the issuing and date of the writ of summons, and contains a copy of all the pleadings, with their dates, concluding thus: "Therefore let a jury come." If there are issues of law as well as of fact, they also are copied into the "Issue" as well as the other pleadings, as the jury may have to assess damages upon them. We are supposing, however, the ordinary case of issues in fact proceeding to trial before a jury. The plaintiff, when he makes up the issue, delivers it to the opposite party, and usually at the same time, if he has not already done so, gives notice of trial; the practice relating to which is regulated by the Common Law Procedure Act, 1852 (*i*), and the Practice Rules of Hilary Term, 1853 (*j*). Under ordinary circumstances ten days' notice of trial must be given. Sometimes, however, a defendant is under terms to take short notice of trial, that is, a four days' notice, where he has obtained by judge's order further time to plead, or some other advantage on those terms (*k*).

(*f*) As to trial by the record, the student is referred to Chitt. Pr., 11th ed. i. p. 924 *et seq.*; *ante*, p. 322 (*f*).

(*g*) See Practice Rules, Hil. T. 1853, *reg.* 16, 17.

(*h*) See sched. to Practice Rules, I.

(*i*) Ss. 97—99.

(*j*) *Reg.* 34—43.

(*k*) C. L. Proc. Act, 1852, s. 101, contains a provision whereby if

plaintiff neglects for a certain time after issue joined to bring the issue to be tried, the defendant may give twenty days' notice to the plaintiff, as prescribed in that section, to proceed to trial, and on plaintiff's default may suggest on the record that the plaintiff has failed to proceed to trial although duly required to do so, and may sign judgment for the costs.

The Nisi Prius Record is a transcript of all the pleadings, in fact a copy of the "Issue," made on parchment (*l*), for the purposes of the trial, and delivered to the proper officer of the court in which the cause is to be tried.

When the trial is impending, the parties prepare and arrange their proofs, oral and documentary, which, as the law of evidence is extensive and difficult, often need anxious consideration. The ordinary process by which the attendance of a witness is secured is called a writ of *subpœna*; or, when the witness has documents that he is required to bring with him, a *subpœna duces tecum*. Sometimes the examination of a witness in a certain emergency, for example illness, or his having to leave the country, or being resident abroad, is taken before the trial under the provisions of statutes directed to that object (*m*), and these depositions are read at the trial should he be unable to attend. Notice to admit and produce documents is also usually given, according as they may be in the possession of the respective parties. Where a document is in the possession of the party seeking to put it in evidence, he usually gives his adversary notice in a certain prescribed form to admit it (*n*): this is done to save costs, if the document be admitted, or to throw the costs of proof on his adversary, in case of his refusing or neglecting to admit it. Should a document which the party seeks to put in evidence be in the possession of his adversary, the party needing it must give his adversary notice to produce it, in order to let in secondary evidence of its contents at the trial, if he then refuses to produce it. Our law most properly requires the document itself to be produced, unless there are sufficient grounds for receiving evidence of its contents *aliunde*,—as, for instance, refusal by one of

(*l*) See C. L. Proc. Act, 1852, ss. 102, 103; and as to annexing particulars of demand and set-off, see Practice Rules, Hil. T. 1853, *reg.* 19.

(*m*) See, *ex. gr.*, stats. 1 Will. 4,

c. 22; 6 & 7 Vict. c. 82; 22 Vict. c. 20.

(*n*) See, as to Notices to Admit, C. L. P. Act, 1852, s. 117; Pract. R. Hil. T. 1853, *reg.* 29, 30, 31.

the parties, in whose possession it is, to produce the document after notice to produce it.

We may add that the parties to an action, except for breach of promise of marriage, or for a penalty or forfeiture under any law relating to the customs or land revenue, are competent and in most cases compellable to give evidence in the cause (o).

Supposing the *nisi prius* record to have been delivered and the cause entered, it will be called on for trial according to the position which it may occupy in the list; and the associate or officer of the court who performs that duty will proceed to empanel the jury from the jurors in attendance. It may be premised that a copy of the jury panel signed by the sheriff is annexed to the *nisi prius* record at the assizes. The jury process was greatly simplified by the provisions of the Common Law Procedure Act, 1852. In ancient times, when an issue in fact was raised between the parties to an action at law, the trial took place in term time at the bar of the court itself. It was also required that the issue should be tried by a jury of the county in which the cause of action arose, and the writs went to the sheriff to bring the jurors from thence to Westminster. The stat. 13 Edw. 1, c. 30 gave justices of assize who tried real actions in the various counties power to hear and determine other issues besides those in real actions, and the writs then ran to the sheriff to have the jurors at Westminster, *nisi prius*, "unless before" that time the justices of assize came to the place where the cause was intended to be tried at a certain time, and as this was practically always the case, it was for such time and place that the jury were in fact summoned, and then and there the cause was tried. Hence arose the term "*nisi prius*" as applied to the ordinary mode of trying causes as distinguished from trials at bar; other statutes followed relating to this process, and until the

(o) 6 & 7 Vict. c. 85; 14 & 15 Vict. c. 99; 16 & 17 Vict. c. 83; 17 & 18 Vict. c. 122.

passing of the Common Law Procedure Act, 1852, various writs to the sheriff, containing more or less reference to the ancient practice, were in use; but by that Act these writs, viz., of *venire facias juratores*, *distringas juratores*, and *habeas corpora juratorum*, and the entry *jurata ponitur in respectu* were rendered no longer necessary (*p*), and the jury are now summoned for the trial of issues at the assizes by the sheriff pursuant to a precept from the judges of assize, and for the trial of causes in London and Middlesex pursuant to a precept under the hand of a judge of any superior court. The Act also contains provisions by which either plaintiff or defendant may apply to obtain a special jury—that is, a jury drawn from a higher class than an ordinary or common jury.

The cause being called on, the jurors, twelve in number, are sworn (*q*); and it is at this particular juncture that either party may exercise a right of challenge, which is of two kinds—a challenge to the array or to the poll. The former occurs where exception is taken to the principle on or means by which the jury has been procured, as where the sheriff has not chosen the jurors impartially; challenge to the poll occurs where exception is taken to individual jurors, which may be on either of the four following grounds: 1. *propter honoris respectum*, as if a lord of parliament be empannelled; 2. *propter defectum*, as if any of the jurors be an alien or an infant, or have not the qualifying estate; 3. *propter affectum* or partiality; and 4. *propter delictum*, on account of crime. The qualifications of jurors, and the exemptions from serving in that capacity (*r*), are mainly regulated by 6 Geo. 4, c. 50. Men between the ages of twenty-one and sixty years who have 10*l.* a-year clear arising out of certain real property, or 20*l.* a-year arising out of certain leasehold property within the county, or who are householders rated to the poor

(*p*) See, as to jury process, C. 35, s. 8.

L. Proc. Act, 1852, ss. 104—115.

(*r*) See Chitty's Arch. Pr. 12th

(*q*) Or affirm, 30 & 31 Vict. c. ed. pp. 430, *et seq.*

rate or inhabited house duty in Middlesex on a value of not less than 30*l.*, or in any other county on a value of not less than 20*l.*, or who occupy a house containing not less than fifteen windows, are qualified and liable to serve. In London a juror must be a householder, or the occupier of a shop, warehouse, counting-house, chambers, or office for the purpose of trade or commerce within the said city, and have lands, tenements, or personal estate of the value of 100*l.* The persons exempted from serving are principally as follows: peers, judges, clergymen, Roman Catholic priests, and dissenting ministers, serjeants and barristers at law, doctors and advocates of the civil law, attorneys, solicitors, proctors; members of the College of Physicians, or College of Surgeons in London, Edinburgh, or Dublin; certificated apothecaries, officers in the navy or army on full pay, licensed pilots, household servants of her majesty, officers of customs and excise; sheriff's officers, high constables, and parish clerks.

Persons described in the jury list as esquires, or of higher degree, or as bankers or merchants, are qualified and liable to serve on special juries, subject, of course, to the exemptions from serving which are of general application.

The jury having been sworn, the junior counsel for the plaintiff states shortly the nature of the pleadings, and the issues of fact which the jury are to try. This is termed "opening the pleadings." After this, the leading counsel for that party to the cause who has the right to begin states with more or less of detail the circumstances out of which the claim arises, or on which the defence rests. The right to begin, involving as it does in most cases the right to reply, is regarded as a valuable privilege, and is frequently in cases where it is at all doubtful made the subject of a contest at the outset of a trial, in which case the presiding judge has to determine the question before the trial can proceed. The party on whom the burthen of proof rests is in general entitled to begin, and usually the burthen of proof in the first instance is on him

who affirms, and not on him who denies. One method of determining the right to begin is by ascertaining against whom the verdict would be entered if no evidence were offered on either side: the party against whom the verdict would in such case be entered would be entitled to begin. It may be, however, that, though the affirmative of the issue or issues joined in the cause lies on the defendant, yet the plaintiff is entitled to begin, *ex. gr.*, where the plaintiff claims unliquidated or unascertained damages, he is the party to begin. Again, where there is no plea in denial of any part of the declaration, but the damages are left at large, and it is for the plaintiff in the opening of his case to show what they are, he is to begin. Thus, in an action against an employer for the wrongful dismissal of the plaintiff from his service, where the defendant does not deny either the employment or the dismissal, but pleads only a justification of the dismissal on the ground of the misconduct of the plaintiff, the affirmative of the issue joined on such plea lies on the defendant; nevertheless he has not in such case the right to begin, because the plaintiff must in the first instance give evidence of the damage which he has sustained.

With regard to the speeches of counsel, each side is allowed to address the jury, setting forth the nature of the claim or defence, and after the evidence in support of the claim or defence is concluded, to make another speech summing up the evidence given (*r*). If the defendant call witnesses, the plaintiff does not sum up his own evidence at the end of his (the plaintiff's) case in the first instance, but after the defendant's evidence has been given and summed up, the plaintiff discusses the case and evidence in what is called the speech in reply.

The evidence and the speeches of counsel for the plaintiff and defendant being concluded, the judge sums up the evidence on both sides, commenting upon it as he

(*r*) C. L. Proc. Act, 1854, s. 18.

proceeds, and directs the jury as to what are the disputed facts they have to determine, giving them at the same time such directions as may be needed concerning the law. Thus, in an action against an infant within the age of twenty-one years for goods sold and delivered in which issue has been joined as to whether the goods supplied were necessities, the judge would state to the jury the legal meaning of the word "necessaries," and having thus defined the law, leave them to determine whether the particular goods were necessities or not (*s*). Again, in an action for the price of goods sold or for money lent, the defence might be founded on the Statute of Limitations (21 Jac. 1, c. 16), and issue having been joined on such plea, the plaintiff might rely on an acknowledgment in writing under Lord Tenterden's Act (9 Geo. 4, c. 14) to take the case out of the statute. Assuming that the original cause of action did not accrue within the six years limited by the statute of James I., and the written document to have been proved, it would be for the judge to direct the jury as matter of law that it was or was not a sufficient acknowledgment to take the case out of the statute (*t*).

Not only has the judge to determine the right to begin, if disputed, but from first to last during the progress of a cause his is the controlling power which guides the legal conduct of the case, and directs it to its proper conclusion (*u*). Who has the right to begin; on whom the burthen of proof rests; what is material in the issues to be tried; what of the evidence tendered is admissible, and what is not; and all directions and definitions of the law necessary to enable the jury to deal with the issues, or to properly estimate the damages; in short, all questions of law as

(*s*) *Ryder v. Wombwell*, L. R. 4 Ex. 32, cited *ante*, p. 352.

(*t*) Generally, as to the sufficiency of an acknowledgment of a debt to bar the Statute of Limitations, see *Tanner v. Smart*, 6 B. & C. 603;

and cases collected in Darby and Bos. Stats. Lim., pp. 47, *et seq.*

(*u*) The judge has also ample power to amend defects, C. L. Proc. Act, 1852, s. 222; 1854, s. 96; 1860, s. 36.

distinguished from questions of fact are for the judge. It is true, also, that long experience and a matured judgment will often enable him to point out to the jury, greatly to their advantage, the bearing and weight of different parts of the evidence on matters purely of fact, and even to present his own view of the general result of the evidence on the merits of the case, but this is never done without his at the same time explaining to the jury that the questions of fact are entirely for their determination, the judge's views being given only in aid of their discharge of that duty.

After the summing up of the judge, the jury give the verdict, which is usually a general verdict, for the plaintiff or defendant, upon the several issues. Sometimes, however, the verdict is a special one, finding certain facts, so that the court *in banco* may afterwards determine the legal effect of such finding. Further, it sometimes happens that the trial comes to a close without the verdict of a jury being given. The defendant's counsel may submit to the judge that there is no question for the jury, that the plaintiff has not made out a *prima facie* case. If the judge is of that opinion, he intimates that the plaintiff should be non-suited, that is, be adjudged to have abandoned his action. The effect of a nonsuit is to put an end to the particular action and to cast upon the plaintiff the defendant's costs as well as his own, but it leaves him at liberty to bring a fresh action for the same cause on a future occasion, should he be so advised. Now as abandonment is a voluntary act, a plaintiff cannot be nonsuited against his will, but inasmuch as, if he persist in having the case brought to the jury, under the direction of the judge, the verdict will most likely be against him, and would for ever exclude him, supposing the judge's direction to be right, from bringing another action for the same cause, he in general assents, in the case put, to be nonsuited. If the judge insists on nonsuiting a plaintiff against his will, or misdirects the jury, should the case be left to them, his

ruling is open to be reviewed, and a new trial may be had. It does doubtless occasionally happen that a cause being called on, and the jury sworn, the plaintiff is nonsuited simply because he fails to appear, and thus, in fact, abandons his case. Frequently, also, after the cause has been entered, and the trial is about to take place, and even after the cause is called on, but before the jury is sworn, if the plaintiff, finding that, through the absence of witnesses or for other reasons, he is not ready to proceed, withdraws the record; the consequence of which is, that he has to pay the defendant's costs of the day, but may re-enter the cause for trial. Other instances may be put of the trial coming to a close without a verdict on the merits. A juror may be withdrawn by consent; this substantially puts an end to the action, because the court would interpose to stay proceedings where, after such a step taken by consent of both parties, either side attempted to bring it on again. Or the judge may discharge the jury from giving a verdict where he finds there is no probability that they will agree. This leaves the case open to be brought on again for trial before another jury. Or the cause may be referred to arbitration; in such case a formal verdict for the plaintiff is usually taken by consent, subject to the reference, the arbitrator having power given him to direct that a verdict shall be entered for the plaintiff or the defendant, or a nonsuit be entered, as he shall think proper. There is a common form for an order of reference at *nisi prius*, containing many stipulations which have been found to be useful, and which are usually adopted by the parties. Sometimes the order of reference is by consent extended beyond the determination of the cause itself, to all matters in difference between the parties.

Proceedings
after trial.

Where, however, the cause is tried out, and the verdict given in the usual way, the litigation does not always end thereby. In very many cases questions arise at *Nisi Prius* which call for consideration by the courts at Westminster,

after the trial is over, before final judgment either on one side or the other can be obtained. If, for example, there are grounds for contending that the judge at *Nisi Prius* has mistaken the principle of law applicable to the case in submitting the facts to the jury, or has erroneously admitted or neglected evidence given or proffered by either of the parties, his ruling may be reviewed, either on a motion for a new trial, which is made in the court in which the action was brought, or by a bill of exceptions tendered at the trial by the party dissatisfied with the ruling. By this latter course the case is at once taken to the court of error. The statute 13 Ed. 1, c. 31, first enabled the parties to take the opinion of a court of error on the ruling of a judge at *Nisi Prius*, and provided that the party dissatisfied with his ruling might tender to the judge a bill of exceptions, setting forth the exceptions taken, to which the judge is bound to affix his seal. The bill of exceptions is then annexed to, and becomes part of, the record. The court of error gives judgment upon the whole record, affirming or reversing the ruling of the judge; and if the ruling be reversed a trial *de novo* is awarded, and the case is again tried. Error in law properly so called lies for errors apparent on the record, and those only, and it was not till recently that means were provided, in addition to the power of tendering a bill of exceptions, and taking the ruling of the judge directly and at once to the court of error, of appealing to the court of error against the decision of the court in which the action was brought, on an application for a new trial, or for leave to enter a verdict or a nonsuit on a point reserved. This power was given by the Common Law Procedure Acts, and now in any case of a rule to enter a verdict or nonsuit upon a point reserved at the trial, if the rule (*v*) to show cause be refused, or

(*v*) A rule to show cause is commonly termed a rule nisi, because it becomes absolute, "*nisi*" "unless" cause is shown. On cause being

shown, the court either discharge the rule or make it absolute, as they may think fit.

granted and then discharged, or made absolute, the party decided against may appeal (*x*). And in any case of a motion for a new trial upon the ground that the judge has not ruled according to law, if the rule to show cause be refused, or, if granted, be then discharged or made absolute, the party decided against may appeal, provided any one of the judges dissent from the rule being refused, or, when granted, being discharged or made absolute, as the case may be; or, provided the court in its discretion think fit that an appeal should be allowed; provided, however, further, that where the application for a new trial is upon matter of discretion only, as on the ground that the verdict was against the weight of evidence or otherwise, no such appeal shall be allowed. The court of error, the exchequer chamber, and the house of lords, are courts of appeal for the purposes of the act.

An instance may be given in which leave might be moved for to enter a verdict or a nonsuit on a point reserved. Suppose it to be clearly established on the facts proved during the progress of a trial, that the liability or non-liability of the defendant depends on the construction and legal effect of a written instrument proved to have been executed by him; the fact of the execution would be matter for the jury, its construction and legal effect for the judge. In such case the course might be for the judge to give his opinion on the point, and the verdict would be entered accordingly for the plaintiff or defendant, leave being given to the party against whom the verdict was entered, to move the court in which the action is brought to enter the verdict for him.

Other grounds of moving for a new trial besides that of a misdirection of the judge, or the improper admission or rejection of evidence, are these:—that the verdict is against the weight of evidence, that the damages are excessive, misconduct of the jury, and that the plaintiff or defendant

(*x*) See Com. Law Proc. Act, 1852, ss. 34—43, and s. 102.

has been taken by surprise. A new trial is not granted on the ground that the verdict is against the weight of evidence where the amount of damages or matter in dispute is less than 20%, and there is no right in question beyond the right to recover damages. Neither is it granted unless it appear that the jury have come to a wrong conclusion on the facts before them. There must be at least a strong preponderance of the evidence against their finding to induce the court to interfere, it being the province of the jury, not of the court, to appreciate the evidence given at the trial. These observations as to a verdict against evidence will apply to the motion for a new trial on the ground that the damages are excessive (*y*), the amount of damages to which the party is entitled being peculiarly within the province of a jury. Should the court think that the damages awarded are somewhat excessive, it may intimate that the rule will be made absolute unless the plaintiff submits to accept a reduction then suggested, and such an intimation is usually acted on to save further litigation and expense. As an instance of misconduct of a jury affording ground for a new trial, may be mentioned the case of their drawing lots for the determination of their verdict. A new trial on the ground of surprise is only granted under very special circumstances, as where the party applying for it has, through some fraudulent trick on the part of his adversary, or in some other way, without fault of his own, been wholly surprised by the evidence given, and had no opportunity of meeting it at the trial.

The usual time (*z*) at which execution may issue where the verdict is not disturbed and judgment follows thereon, is fourteen days from the verdict, unless the judge who tries the cause, or some other judge or the court, orders execution to issue at an earlier or later period, with or

(*y*) A new trial may also be granted on account of the smallness of damages; but an application on this ground is of rare occurrence.

(*z*) Com. Law Proc. Act, 1852. s. 120.

without terms. Before, however, giving an account of execution, some other proceedings besides those already noticed, that may intervene before final judgment is obtained, may properly be mentioned.

First, then, as to entering judgment *non obstante veredicto*, and motion in arrest of judgment. Where the defendant has succeeded at the trial, and obtained a verdict in his favour, on a plea which confesses the cause of action, but does not show any sufficient answer to it, the court will give judgment for the plaintiff "*non obstante veredicto*," "notwithstanding the verdict." So when on the face of the record it appears that the plaintiff has no right to recover, judgment may be arrested on motion made by the defendant for that purpose; but these applications after trial are at the present day comparatively unusual. It seldom now happens that substantial defects on the face of the pleadings are passed over without demurrer, it being open to the parties to plead and demur at the same time. Moreover, on motion in arrest of judgment, or for judgment *non obstante veredicto*, by reason of the non-averment of some alleged material fact or facts of material allegation or other cause, the party whose pleading is alleged or adjudged to be therein defective may, by leave of the court, suggest the existence of the omitted fact or facts, or other matter which, if true, would remedy the alleged defects: and such suggestion may be pleaded to by the opposite party within eight days after notice thereof, or such further time as the court or a judge may allow, proceedings for trial of any issues joined upon such pleadings being the same as in ordinary actions (a), and judgment follows the result of the suggestion. There is this further check also against a party lying by for the purpose of taking advantage after verdict of defects in the pleadings: that the costs of abortive issues, upon which his adversary has succeeded at the trial, are thrown upon him, it being expressly

(a) Com. Law. Proc. Act, 1852, ss. 143, 144.

provided (b) that upon an arrest of judgment, or judgment *non obstante veredicto*, the court shall adjudge to the party against whom such judgment is given the costs occasioned by the trial of any issues of fact arising out of the pleadings for defect of which such judgment is given, and upon which such party shall have succeeded.

With regard to time, a motion for a new trial, or to enter a verdict or nonsuit, motion in arrest of judgment, or for judgment *non obstante veredicto*, cannot be made after the expiration of four days from the day of trial, nor in any case after the expiration of the term, if the cause were tried in term, nor after the expiration of the first four days of the ensuing term if the cause were tried out of term, unless entered in a list of postponed motions by leave of the court (c).

Error lies, after final judgment has been obtained, to reverse a judgment on the ground of some defect in the proceeding, which renders it erroneous. There is error in fact and error in law, the former relating only to the case where some fact not appearing on the record invalidates the judgment on grounds of a technical character, as for instance, that the defendant, being an infant, appeared by attorney. The grounds, however, on which error in fact may be brought are few and of rare occurrence. Error in law is where, on the face of the record, it appears that the judgment was given on insufficient grounds, as that the declaration is insufficient in law to maintain the action, and that judgment ought to have been given for the defendant instead of the plaintiff. Error in law may, and not unfrequently does, follow upon demurrer. A pleading having been demurred to, and issue of law joined, and judgment given, the unsuccessful party seeking to reverse the judgment of the court proceeds in error with that object. Error lies on the judgment on a special verdict,

(b) Com. Law Proc. Act, 1852, s. 145. (c) Rules, Hil. T. 1853, reg. 50.

and it also may be brought on a judgment upon a special case (*d*) in the same manner as upon a judgment upon a special verdict, unless the parties agree to the contrary; and the court of error may either affirm the judgment, or give the same judgment as ought to have been given by the court below, the said court of error being required to draw any inference of fact from the facts stated in such special case, which the court where the question was originally decided ought to have drawn (*e*). No judgment can be reversed in error unless error be commenced within six years after such judgment was signed or entered of record, except where the person entitled to bring error is at the time such title accrues within the age of twenty-one years, *feme covert*, *non compos mentis*, or beyond the seas, in either of such cases extended time being given for action in the superior courts. The writ of error is no longer necessary or used for bringing error; the proceeding to error is a step in the cause (*f*).

Error in fact has to be substantiated by affidavit, and is brought in the court where the judgment is given. Error in law is matter for argument before the court of error. Upon a suggestion (*g*) of error in law alleged and denied, the cause is set down for argument, and the judgment roll is without any writ or return brought by the master into the court of error in the exchequer chamber, before the justices, or the justices and barons, as the case may be, of the other two superior courts of common law, on the day of its sitting, at such time as the judges ap-

(*d*) Com. Law Proc. Act, 1854, s. 32.

(*e*) Com. Law Proc. Act, 1854, s. 32. It had already been provided by the Com. Law Proc. Act, 1852, s. 157, that courts of error should, in all cases, have power to give such judgment and award such process as the court from which

error is brought, ought to have done without regard to the party alleging error.

(*f*) Com. Law Proc. Act, 1852, ss. 146—148.

(*g*) See s. 149 of Com. Law Proc. Act, 1852, and schedule (A.) thereto, Nos. 10, *et seq.*

point (*h*), and, when judgment has been there given, the proceedings in error may be carried from the exchequer chamber to the high court of Parliament, and the court of error then hears and determines the case. The proceedings in error are regulated by provisions (*i*) of the Common Law Procedure Act, 1852, and the practice rules of Hil. Term, 1853.

Where some ground of defence against proceeding on the judgment has arisen after judgment, this may be made the subject of a writ of *audita querela*, by which a defendant seeks relief from the court by not having the judgment enforced against him. No writ of *audita querela*, however, can be issued without leave of the court or a judge (*h*), and the use of this writ has in modern times been in a great measure superseded by application on motion to the court, on which, on sufficient grounds, summary relief is granted. Equitable defences arising after lapse of the period during which they could be pleaded may be set up by way of *audita querela* (*l*).

Final judgment in the action having been signed, execution may issue. The ordinary writs of execution, by which the recovery of money (*m*) is enforced on a judgment, are those of *feri facias*, *elegit*, and *capias ad satisfaciendum*; they issue out of the court in which the record is, and are directed to the sheriff of the county in which the execution is to be had (*n*). The writ of *feri facias* (*o*) commands the sheriff that he cause to be made out of the goods and chattels of the judgment debtor in his bailiwick the amount of such judgment, together with interest thereon at the rate of 4*l.* per cent. from the day on which

(*h*) Com. Law Proc. Act, 1852, s. 84.

s. 155.

(*i*) See ss. 146—167; and Practice Rules, Hil. T. 1853, *reg.* 64—69; Com. Law Proc. Act, 1854,

s. 96.

(*k*) Rules, Hil. T. 1853, *reg.* 79.

(*l*) Com. Law Proc. Act, 1854,

(*m*) As to the writ of execution in ejectment, *ante*, p. 279.

(*n*) See Com. Law Proc. Act, 1852, s. 121.

(*o*) See forms of proceedings, schedule to *Reg. Gen.* Hil. T.

1853, pt. ii.

judgment was entered up. Not only what are ordinarily termed goods and chattels may, with the exception of wearing apparel, be taken under this writ, but leases and terms of years, also money (*p*), bank-notes, cheques, bills of exchange, promissory notes, bonds, specialties, or other securities for money belonging to the person against whose effects it has been sued out; growing crops (*q*) may also in certain cases, and with some qualification, be taken under it. The time within which writs of execution ordinarily (*r*) bind the goods is from the time of their delivery to the sheriff to be executed, but persons acquiring title to goods *bond fide*, and for a valuable consideration, before the actual seizure under the writ, and without notice of the writ, are protected against the execution (*s*).

The proceeding on interpleader may here be noticed. By it relief and protection are afforded to sheriffs and other officers when placed in a difficulty, arising out of the execution of process against goods and chattels, by reason of claims made to such goods and chattels by assignees of bankrupts and other persons, not being the parties against whom such process was issued. Where the sheriff has acted *bond fide* and impartially in the discharge of his duties, and there is a dispute between the execution creditor on the one hand, and a stranger to the action on the other, making a claim to any goods or chattels, taken or intended to be taken in execution under any process, or to the proceeds or value thereof, they may be called upon to appear before the court or a judge, and either to maintain or relinquish their respective claims or try the same between themselves, one mode of doing which is by proceeding to trial under the order of the court on

(*p*) 1 & 2 Vict. c. 112, s. 12; and see also *ib.* as to charging stock in the funds or shares in companies, by order of a judge, though they cannot be taken in execution under

the writ.

(*q*) 56 Geo. 3, c. 50, and 14 & 15 Vict. c. 25, s. 2.

(*r*) See 20 Car. 2, c. 3, s. 16.

(*s*) 19 & 20 Vict. c. 97, s. 1.

an issue made up on the question of property, for determining to whom the goods belong. Or the parties to an interpleader may by consent have the merits of their claims disposed of in a summary manner by the court or a judge, or that may be done even without consent, at the request of either party, wherever from the smallness of the amount in dispute or the value of the goods seized it appears to the court or a judge right to order so. The issue was formerly termed "a feigned issue," because it used to state that a wager had been laid between the two parties respectively maintaining the affirmative and negative of the proposition in dispute, but the act to amend the law concerning games and wagers, introduced a simple form of issue stating merely that one party affirmed and the other denied the fact to be put in issue (*t*). It was probably deemed inconsistent that a form founded on a supposed wager should be used to raise the issue, when by that statute no action at law could have been maintained on such a wager had it been a real instead of a fictitious transaction. Nevertheless, the use of the old form, though by practice supplanted by the new one, is not positively interdicted by the statute just referred to.

It may further be mentioned that relief by way of interpleader could formerly only be obtained by a suit in equity, and it was the act 1 & 2 Will. 4, c. 58, commonly called the Interpleader Act, that first enabled courts of law to give relief against adverse claims made upon persons having no interest in the subject of such claims. It extends not only as we have mentioned to the relief of sheriffs and other officers, but to persons generally, when sued at law for the recovery of money or goods wherein they have no interest (*u*).

The writ of *elegit* (*v*) is so called because the person

(*t*) 8 & 9 Vict. c. 109, s. 19.

(*w*) See stat. 13 Edw. 1, c. 18,

(*u*) See the provisions of that statute; 1 & 2 Vict. c. 45; Com. Law Proc. Act, 1860, s. 12.

and the sched. of forms, *Reg. Gen.* Hil. T. 1853, Pt. ii. Nos. 9—13.

suing out the execution is said to have chosen or elected to have that remedy instead of the proceeding by *fiery facias*. By the writ of *elegit* the sheriff is commanded that he cause to be delivered to the judgment creditor by a reasonable price and extent the goods and chattels of the judgment debtor (except his oxen and beasts of the plough), and also such lands, tenements, rectories, tithes, rents, and hereditaments, including lands or hereditaments of copyhold or customary tenure, as the said judgment debtor or any person in trust for him was seised or possessed of on the day on which judgment (*x*) was entered up, or at any time afterwards, or over which he on that day had any disposing power which he might (without the assent of any other person) exercise for his own benefit to hold the said goods and chattels, also to hold the said lands, tenements, rents, tithes, rectories, and hereditaments respectively, according to the nature and tenure thereof, to him and to his assigns, until the amount due under the execution be levied. The sheriff's duty under this writ is to impanel a jury to inquire of the goods and chattels of the debtor, and to appraise them, and also to inquire as to his lands and their value, and the goods (if any) are to be delivered to the execution creditor; and if the value of the goods is insufficient to satisfy the execution, the legal possession or right of entry to the lands is delivered to the execution creditor.

The writ of *capias ad satisfaciendum* commands the sheriff to take the body of the judgment debtor, and him safely keep, so that he may have his body to satisfy the judgment creditor the amount of the judgment with in-

(*x*) As to registration of writs of execution to affect lands in the hands of purchasers and mortgagees, see 23 & 24 Vict. c. 38, and also 27 & 28 Vict. c. 112, s. 1, which enacts that no judgment to be entered up after the passing of

that act shall affect any land (of whatever tenure) until such land shall have been actually delivered in execution by virtue of a writ of *elegit*, or other lawful authority in pursuance of such judgment.

terest at 4*l.* per cent. from the day on which judgment was entered up. The defendant cannot be taken on a *ca. sa.* in an action for the recovery of a debt wherein the sum recovered does not exceed 20*l.*, exclusive of the costs of such judgment.

We may here notice that by the Common Law Procedure Act, 1854 (*y*), a new process of execution was given, in addition to the above, in actions in the superior courts, by the attachment of debts due to the judgment debtor. A judge may now make an order that debts owing or accruing from a third person to the judgment debtor shall be attached to answer the judgment debt. The third person, or garnishee (*z*), as he is termed, has full opportunity given him under the provisions of the act for showing cause against an order on him to pay such debt to the judgment creditor, and his liability, if disputed, is tried in a suit instituted by the judgment creditor against such garnishee, as prescribed by the act.

During the lives of the parties to a judgment, execution may issue at any time within six years from the recovery of the judgment, without a revival of the judgment. After that period, or after a change by death or otherwise of the parties entitled or liable to execution, before execution can issue upon it, it must be revived by writ or with leave of the court or a judge by suggestion (*a*).

Such is the ordinary course of an action at law as remodelled by the Procedure Acts and by the Rules of Pleading and Practice founded thereupon (*b*).

(*y*) Ss. 60, 67.

(*z*) From the French word "*gar-nir*," to warn.

(*a*) Com. Law Proc. Act. 1852, ss. 128—134.

(*b*) In connection with the foregoing account of modern procedure, and by way of contrast with it, some notice is here appended of

the ancient trial by wager of battle, which was abolished by stat. 59 Geo. 3, c. 46. This method of deciding a civil controversy seems to have owed its origin to the military spirit of our ancestors, joined to a superstitious frame of mind: it being in the nature of an appeal to Providence, under an apprehen-

sion and hope (however presumptuous and unwarrantable) that heaven would give the victory to him who had the right. The decision of suits by this appeal to the God of battles is by some said to have been invented by the Burgundi, one of the northern or German clans who planted themselves in Gaul. Yet it does not seem to have been merely a local custom of this or that particular tribe, but to have been the common usage of all those warlike races from the earliest times (Seld. of Duels, c. 5). It may also be inferred, from a passage in Velleius Paterculus (lib. 2, c. 118), that the Germans, when first they became known to the Romans, were wont to decide contests of right by the sword: for when Quintilius Varus endeavoured to introduce among them the Roman laws and method of trial, it was looked upon (says the historian) as a "*novitas incognitæ disciplinae, ut solita armis decerni jure terminarentur.*"

This trial was introduced into England among other Norman customs by William the Conqueror; but was only used in three cases, one military, one criminal, and the third civil. The first in the court-martial, or court of chivalry and honour (Co. Litt. 261); the second in appeals of felony (as to which *vide post*, vol. iv.); and the third, upon issue joined in a writ of right, the last and most solemn decision of real property (*ante*, p. 271). One pretext for allowing it, upon these final writs of right, was for the sake of such claimants as might have the true right, but yet by the death of witnesses, or other defect

of evidence, be unable to prove it to a jury.

The last trial by battle waged in the court of common pleas at Westminster (though there was afterwards (Rushw. Coll. vol. ii. pt. 2, fol. 112; 19 Rym. 322) one in the court of chivalry in 1631, and another in the county palatine of Durham (Cro. Car. 512) in 1638) was in the thirteenth year of queen Elizabeth, A.D. 1571, as reported by sir James Dyer (Dyer, 301): and was held in Tot-hill Fields, Westminster, "*non sine magnâ juris-consultorum perturbatione,*" says sir Henry Spelman (Glosa. 102), who was himself a witness of the ceremony. The form, as appears from the authors before cited, was as follows:—

When the tenant in a writ of right pleaded the general issue, *viz.*, that he had more right to hold, than the demandant had to recover; and offered to prove it by the body of his champion, which tender was accepted by the demandant; the tenant in the first place produced his champion, who, by throwing down his glove as a gage or pledge, thus waged or stipulated battle with the champion of the demandant; who, by taking up the gage or glove, stipulated on his part to accept the challenge. The reason why it was waged by champions, and not by the parties themselves, in civil actions, was because, if any party to the suit died, the suit must have abated, and therefore no judgment could have been given for the lands in question, if either of the parties were slain in battle (Co. Litt. 294; Diversité des Courts, 304): and also that no person might claim an exemption from this trial, as was

allowed in criminal cases, where the battle was waged in person (*post*, vol. iv.).

A piece of ground was then in due time set out, of sixty feet square, enclosed with lists, and on one side a court was erected for the judges of the court of common pleas, who attended there in their scarlet robes; and also a bar was prepared for the learned serjeants at law. When the court sat, which was properly by sunrising, proclamation was made for the parties and their champions, who were introduced by two knights, and were dressed, each in a coat of armour, with red sandals, barelegged from the knee downwards, bareheaded, and with bare arms to the elbows. The weapons allowed them were only batons, or staves of an ell long, and a four-cornered leather target; so that death very seldom occurred in this civil combat. When the champions, thus armed with batons, had arrived within the lists or place of combat, the champion of the tenant took his adversary by the hand, and made oath that the tenements in dispute were not the right of the demandant; and the champion of the demandant, then taking the other by the hand, swore in the same manner that they were: each champion thus professing himself to be thoroughly persuaded of the truth of the cause he fought for. Next, an oath against sorcery and enchantment had to be taken by both the champions, in this or a similar form: "Hear this, ye justices, that I have this day neither eat, drank, nor have upon me, neither bone, stone, ne grass; nor any enchantment, sorcery, or witchcraft, where-

by the law of God may be abased, or the law of the devil exalted. So help me God and his saints."

The battle was then begun, and the combatants were bound to fight till the stars appeared in the evening; and, if the champion of the tenant could defend himself till the stars appeared, the tenant prevailed in his cause; for it was sufficient for him to maintain his ground, and make it a drawn battle, he being already in possession. But if the victory declared itself for either party, for him was judgment finally given. This victory might have arisen from the death of either of the champions, which, however, rarely happened; the whole ceremony, to say the truth, bearing a near resemblance to certain rural athletic diversions, which were probably derived from this original. Or victory was obtained, if either champion proved recreant, that is, yielded, and pronounced the horrible word "*craven*," a word of disgrace and obloquy, rather than of any determinate meaning. But a horrible word it indeed was to the vanquished champion: since, as a punishment to him for forfeiting the land of his principal by pronouncing that shameful word, he was condemned, as a recreant, *amittere liberam legem*, that is, to become infamous, and not be accounted *liber et legalis homo*; being supposed by the event to be proved forsworn, and therefore never to be put upon a jury, or admitted as a witness in any cause.

Such was the form of a trial by battle; a trial which the tenant, or defendant in a writ of right, had it in his election to demand; and

which was the only decision of such writ of right after the Conquest, till Henry II. by consent of parliament introduced the grand assize, a peculiar species of trial by jury, in concurrence therewith ; giving the tenant his choice of either the one or the other. The establishment of this alternative, Glanvil (lib. ii.

c. 7,) chief justice to Henry II., considered as a most noble improvement of the law.

When compared with a method of decision so barbarous as that above described, the eulogies often and lavishly passed on our trial by jury would scarcely seem to be overstrained.

CHAPTER XIII.

INJURIES PROCEEDING FROM, OR AFFECTING THE CROWN.

HAVING in preceding chapters considered the injuries, or private wrongs, that may be offered by one subject to another, and how they may be remedied, we proceed to inquire as to the mode of redressing those injuries to which the crown itself is a party: such injuries are either where the crown is the aggressor, or else is the sufferer; and these are usually remedied by peculiar forms of process, appropriated to the royal prerogative. We will here consider the manner: I. Of redressing those wrongs or injuries which a subject may suffer from the crown; and, II. Of redressing those which the crown may receive from a subject.

I. That “the king can do no wrong,” is a necessary and fundamental principle of the English constitution: meaning only, as was formerly observed (*a*), that in the first place, whatever may be amiss in the conduct of public affairs is not chargeable personally on the sovereign; and, secondly, that the prerogative of the crown extends not to do any injury; for, being created for the benefit of the people, it cannot be exerted to their prejudice (*b*). Whenever therefore it happens, that, through misinformation, or inadvertence, the crown has been induced to invade the private rights of any of its subjects, though no action will lie against the sovereign (*c*), yet the law has furnished the

Redress of
wrongs in-
flicted by
the crown.

(*a*) Vol. i. p. 292.

(*b*) Plowd. 487.

(*c*) Jenkins, 78; Finch, L. 83.

subject with a decent and respectful mode of removing that invasion, by informing him of the true state of the matter in dispute; which will then be put in a regular train for adjudication and adjustment.

The distance between the crown and the subject is such, that a personal injury can seldom proceed immediately and directly from the sovereign to any private man; and, as it can so seldom happen, the law in decency supposes that it never will or can happen at all; because it feels itself incapable of furnishing any adequate remedy for such wrong, without infringing the dignity and destroying the sovereignty of the royal person, by setting up some superior power with authority to call him to account. The inconvenience therefore of a mischief that is barely possible, is (as Mr. Locke has observed (*d*)) well recompensed by the peace of the public and security of the government, in the person of the chief magistrate being set out of the reach of coercion.

And upon this principle, the sovereign cannot be made answerable for the misconduct or negligence of his servants (*e*). Injuries to the rights of property can scarcely be committed by the crown without the intervention of its officers; and for them the law in matters of right entertains no respect or delicacy, but furnishes various methods of detecting the errors or misconduct of those agents by whom the sovereign has been deceived, and induced to do a temporary injustice (*f*).

*Petition de
droit and
monstrans
de droit.*

The common law methods of obtaining possession or restitution from the crown, of either real or personal property, are, 1. By *petition de droit*, or petition of right: which is said to owe its origin to king Edward I. (*g*). 2. By *monstrans de droit*, manifestation or plea of right. The former is of use where the sovereign is in full pos-

(*d*) On Gov. pt. 2, s. 205.

(*f*) Broom, Const. Law, *ubi sup*.

(*e*) *Visc. Canterbury v. Att.-Gen.*,

(*g*) Bro. Abr. tit. *Prerog.* 2;

1 Phill. 306; Broom, Const. Law,
pp. 243, 723, and cases there cited.

Fitz. Abr. tit. *Error*, 8.

session of any hereditaments or chattels, and the petitioner suggests such a right as controverts the title of the crown, grounded on facts disclosed in the petition itself; in which case he must be careful to state truly the whole title of the crown, otherwise the petition shall abate (*h*): and then, upon this answer being indorsed or underwritten by the sovereign, *soit droit fait al partie* (let right be done to the party), a commission will issue to inquire of the truth of this suggestion (*i*): after the return of which, the attorney-general may plead in bar; and the merits will be determined upon issue or demurrer, as in suits between subject and subject. Thus, if a disseisor of lands, which are holden of the crown, dies seised without any heir, whereby the crown is *prima facie* entitled to the lands, and gets possession of them; now the disseisee may have remedy by petition of right, suggesting the title of the crown, and his own superior right (*k*). But where the right of the party, as well as the right of the crown, appears upon record, there the party shall have *monstrans de droit*, which is putting in a claim of right grounded on facts already acknowledged and established, and praying the judgment of the court, whether upon those facts the crown or the subject has the right. As if, in the case before supposed, the whole special matter is found by an inquest of office (as well the disseisin, as the dying without any heir), the party grieved shall have *monstrans de droit* at the common law (*l*).

The remedy by *monstrans* was much enlarged and rendered almost universal by several statutes, particularly 36 Edw. 3, c. 17, and 2 & 3 Edw. 6, c. 8 (*m*), which also allowed inquisitions of office to be traversed or denied, wherever the right of a subject was concerned, except in a very few cases (*n*). This proceeding is, in general, had

(*h*) Finch, L. 256.

(*l*) *The Saddlers' Case*, 4 Rep. 55.

(*i*) Skin. 608; Rast. Entr. 461.

(*m*) In part repealed by 26 & 27

(*k*) Bro. Abr. tit. *Petition*, 20; Vict. c. 125.

4 Rep. 58.

(*n*) Skin. 608.

in the petty-bag office in the court of chancery: and, if upon it the right claimed be finally determined against the crown, the judgment is, *quod manus domini regis amoveantur* (o), and by such judgment the crown is immediately out of possession (p).

Although it is still competent to a subject seeking redress as against the crown to proceed according to the course above indicated (q), he will probably be advised rather to avail himself of the simpler and more effective process provided by the recent statute 23 & 24 Vict. c. 34, relating to petitions of right, and re-modelling the practice therewith connected. A petition of right, addressed to the sovereign, may now, if the suppliant think fit, be entitled in any superior court of common law or equity in which the subject-matter of such petition, or any material part thereof, would have been cognizable if the same had been a matter in dispute between subject and subject, and, if entitled in a court of common law, the petition must state in the margin a venue (r) showing where the trial thereon is to be. The petition must set forth with convenient certainty the facts entitling the suppliant to relief, and must be signed by the suppliant, his counsel, or attorney (s). It is to be left with the home secretary, in order that the same may be submitted to the queen for consideration, and that her fiat that right be done may, if she think fit, be granted thereupon (t).

A copy of the petition and fiat (when obtained) are to be left at the office of the solicitor to the treasury, indorsed as required by the act, and praying for a plea or answer on behalf of the crown within twenty-eight days. The petition will then be transmitted to the particular

(o) 2 Inst. 695; Rast. Ent. 463; Finch, L. 460.

(p) Finch, L. 459.

As to the remedy by *monstrans de droit*, see Lord Somers's celebrated argument in *The Bankers' Case*, 14 St. Tr. 77.

(q) 23 & 24 Vict. c. 34, s. 18.

(r) Which venue may afterwards, however, be changed; s. 4.

(s) S. 1.

(t) S. 2. See *Irwin v. Grey*, 3 F. & F. 635; L. R. 1 C. P. 171; L. R. 2 H. L. 20.

department to which the subject-matter thereof may relate, and will be prosecuted in the court in which it is entitled, or in such other court as the lord-chancellor may direct (*u*).

The time for answering, pleading, or demurring to the petition, on behalf of the crown, is the said period of twenty-eight days after the same has been left at the office of the solicitor to the treasury, or such further time as may be allowed (*x*).

If the petition of right be presented for the recovery of real or personal property, or any right in or to the same, which has been granted away or disposed of by the crown, a copy of such petition, allowance, and fiat, as aforesaid, must be served upon, or left at the place of abode of, the person in the possession, occupation, or enjoyment of such property or right, indorsed with a notice requiring him to appear thereto within eight days, and to plead or answer thereto in the court in which the same is prosecuted within fourteen days after service: and the party thus served must, within the time so limited, if he intend to contest the petition, enter an appearance to the same, and plead, answer, or demur thereto within the time specified in such notice, or such further time as may be allowed (*y*).

The petition may, under the provisions of the recent act, be answered by way of answer, plea, or demurrer in a court of equity, or in a court of common law by way of plea or demurrer, or by both pleas and demurrer, by or in the name of the attorney-general on behalf of the crown, and by or on behalf of any other person who may be called upon to plead or answer thereto, in the same manner as if such petition in a court of equity were a bill filed therein, or, if the petition be prosecuted in a court of common law, as if the same were a declaration in a personal action, and such matter as would be sufficient ground of answer or defence in point of law or fact to such petition on the behalf of the crown may be alleged

(*u*) S. 3.

(*x*) S. 4.

(*y*) S. 5.

on behalf of any person called on to plead or answer thereto (*z*).

The practice and course of procedure in a suit in equity or personal action between subject and subject, so far as applicable, shall be observed in prosecuting a petition of right under the act (*a*). And the judgment for the suppliant now is, that he is entitled to such relief, and upon such terms and conditions (if any), as the court shall think just (*b*).

Judgment having been given for the suppliant, any judge of the court in which the petition was prosecuted will, upon application on behalf of the suppliant, after the lapse of fourteen days from the making, giving, or affirming of such judgment, certify to the commissioners of the treasury, or to the treasurer of her majesty's household, as the case may require, the tenor and purport of the same, in the form given by the act (*c*), and thereupon the commissioners of the treasury will pay the amount of monies and costs, due under the judgment to the suppliant, out of any funds in their hands for the time being legally applicable thereto, or which may be afterwards voted by parliament for that purpose, provided such petition relate to any public matter. But in case the petition relate to any private property of or enjoyed by her majesty, or any contract or engagement made by or on behalf of her majesty, or any matter affecting the queen in her private capacity, a certificate as aforesaid must be sent to the treasurer of the queen's household, and the amount to which the suppliant is entitled will be paid him out of such funds or monies as her majesty may direct to be applied for that purpose (*d*).

II. Injuries
to the
crown.

II. The methods of redressing such injuries as the crown may receive from the subject are,

How remedied.

1. By certain common law actions, such as *quare im-*

(*z*) S. 6.

(*a*) S. 7.

(*b*) Ss. 9, 10.

(*c*) S. 13.

(*d*) S. 14.

pedit (e) or trespass (f), the bringing and maintaining of which have been deemed to be not inconsistent with the dignity of the crown. It would, however, be alike tedious and difficult to run through every minute distinction that might be gleaned from our ancient books with regard to this matter; nor is it in any degree necessary to do so, as much easier and more effectual remedies are usually afforded by certain prerogative modes of process, which are peculiarly confined to the sovereign.

2. By inquisition or inquest of office: which is an inquiry made by the queen's officer, her sheriff, coroner, or escheator, *virtute officii*, or by writ to him sent for that purpose, or by commissioners specially appointed, concerning any matter that entitles the queen to the possession of lands or tenements, goods or chattels (g). This is done by a jury of no determinate number; being either twelve, or less, or more; who, *ex. gr.*, inquire whether the tenant for life of the crown died seised, whereby the reversion accrues to the crown: whether A., who held immediately of the crown, died without heirs; in which case the lands belong to the sovereign by escheat: whether B. be attainted of treason; whereby his estate is forfeited to the crown: or whether C., who has purchased lands, be an alien; which may be another cause of forfeiture. These inquests of office were more frequent during the continuance of military tenures amongst us than they are at present; for then, upon the death of any of the king's tenants, an inquest of office was held, called an *inquisitio post mortem*, to inquire of what lands he died seised, who was his heir, and of what age, in order to entitle the sovereign to his marriage, wardship, relief, *primer-seisin*, or other advantages, as the circumstances of the case might turn out. To superintend and regulate these inquiries the court of wards and liveries was instituted by statute 32 Hen. 8,

(e) F. N. B. 32.

Hen. 4, 4.

(f) Bro. Abr. tit. *Prerogative*, 130; F. N. B. 90; Year Book, 4

(g) Finch, L. 323, 4, 5.

c. 46, which was abolished at the restoration of king Charles II., together with the oppressive tenures upon which it was founded.

With regard to other matters, the inquests of office still remain in force, and are taken upon proper occasions; not only in regard to lands, but also to goods and chattels personal, as in the case of wreck, when appertaining to the crown, treasure-trove, and the like; and to forfeitures for offences. For every jury which tries a man for treason or felony, every coroner's inquest that sits upon a *felo de se*, or one killed by chance-medley, is not only with regard to chattels, but also as to real interests, thus far an inquest of office, that if they find the treason or felony, the crown is thereupon, by virtue of this office found, entitled to its forfeitures (*h*).

These inquests of office were anciently devised by law, as an authentic means to give the king his right by solemn matter of record; without which he in general could neither take nor part from anything (*i*); it being essential for the liberties of England, and greatly for the safety of the subject, that the crown may not enter upon or seize any man's possessions upon bare surmises without the intervention of a jury (*h*). It was however particularly enacted by the statute 33 Hen. 8, c. 20, that, in case of attainder for high treason, the king should have the forfeiture instantly, without any inquisition of office. And, as the crown has (in general) no title at all to any property of this sort before office found, therefore the statute 18 Hen. 6, c. 6, had provided that all letters patent or grants of lands and tenements before office found, or returned into the exchequer, should be void. And, by the Bill of Rights at the Revolution, 1 Will. & M. st. 2, c. 2, it is declared that all grants and promises of fines and forfeitures of particular persons before conviction (which

(*h*) *Post*, vol. iv.

(*i*) *Finch*, L. 82.

(*h*) *Gilb. Hist. Exch.* 132; *Hob.* 317.

is here the inquest of office) are illegal and void; as indeed was the law of the land in the reign of Edward III. (*l*).

With regard to real property, if an office be found for the king, it puts him in immediate possession, without the trouble of a formal entry, provided a subject in the like case would have had a right to enter; and the king shall receive all the mesne or intermediate profits from the time that his title accrued (*m*). As on the other hand, by the *articuli super cartas* (*n*), if the king's escheator or sheriff seize lands into the king's hand without cause, upon taking them out of the king's hand again, the party shall have the mesne profits restored to him.

In order to avoid the possession of the crown, acquired by the finding of such office, the subject may not only have his petition of right, which discloses new facts not found by the office, and his *monstrans de droit*, which relies on the facts as found: but also he may (for the most part) traverse or deny the matter of fact itself, and put it in a course of trial: yet still, in some special cases, he has no remedy left but a mere petition of right (*o*). These traverses, as well as the *monstrans de droit*, were greatly enlarged and regulated for the benefit of the subject, by the statutes before mentioned, and others (*p*). And in the traverses thus given by statute, which came in the place of the old petition of right, the party traversing is considered as the plaintiff (*q*); and must therefore make out his own title, as well as impeach that of the crown, and then shall have judgment *quod manus domini regis amoveantur*, &c.

3. Where the crown has unadvisedly granted anything by letters patent, which ought not to have been granted, or where the patentee has done an act that amounts to a forfeiture of the grant, the remedy to repeal the patent

May be traversed.

3. Scire facias in Chancery to repeal patents.

(*l*) 2 Inst. 48.

(*m*) Finch, L. 325, 326.

(*n*) 28 Edw. 1, stat. 3, c. 19.

(*o*) Finch, L. 324.

(*p*) See stat. 34 Edw. 3, c. 13; 36 Edw. 3, c. 13; 2 & 3 Edw. 6, c. 8.

(*q*) Law of Nisi Prius, 211, 212.

is by writ of *scire facias* in chancery, as we have before stated (r).

4. Informa-
tion.

4. An information on behalf of the crown, filed in the exchequer by the attorney-general, is a method of suit for recovering money or other chattels, or for obtaining satisfaction in damages for a personal wrong committed in the lands or to other possessions of the crown (s). It differs from an information filed in the court of queen's bench, of which we shall treat in the next Volume, for this is instituted to redress a private wrong, by which the property of the crown is affected; that is calculated to punish some public wrong committed by the defendant. An information in the exchequer is grounded on no writ under seal, but merely on the intimation of the attorney-general, who "gives the court to understand and be informed of" the matter in question: upon which the party is put to answer, and trial is had, as in a suit between subject and subject. The most usual informations are those for intrusion and for debt: intrusion, for any trespass committed on the lands of the crown, as by entering thereon without title, holding over after a lease is determined, taking the profits, cutting down timber, or the like; and debt, upon any contract for money due to the crown, or for a forfeiture so due upon the breach of a penal statute. The procedure by information is used to recover a forfeiture, occasioned by transgressing a law enacted for the establishment and support of the revenue: enactments which regard mere matters of police and public convenience, being usually left to be enforced by common informers, in *qui tam* actions. There is also an information *in rem*, when goods are supposed to have become the property of the crown, and no man appears to claim them, and to dispute its title, as anciently in the cases of treasure-trove, wrecks, waifs, and estrays, seized by the king's officer for his use. Upon such seizure an information was usually filed in the

(r) *Lntc*, pp. 32, 33.

(s) *Moor*, 375.

exchequer, and thereupon a proclamation was made for the owner (if any) to come in and claim the effects; and at the same time there issued a commission of appraisement to value the goods in the officer's hands; after the return of which, and a second proclamation had, if no claimant appeared, the goods were supposed derelict, and condemned to the use of the crown (*t*). And when, in later times, forfeitures of the goods themselves, as well as personal penalties on the parties, were inflicted by act of parliament for transgressions against the laws of the customs and excise, similar process was adopted in order to secure such forfeited goods for the public use, though the offender himself had escaped the reach of justice.

5. The ancient writ of *quo warranto* was in the nature of a writ of right for the crown, against him who claimed or usurped any office, franchise, or liberty, to inquire by what authority he supported his claim, in order to determine the right (*u*). It lay also in case of non-user or long neglect of a franchise, or mis-user or abuse of it; being a writ which commanded the defendant to show by what warrant he exercised such a franchise, having never had any grant of it, or having forfeited it by neglect or abuse. This writ was originally returnable before the king's justices at Westminster (*x*); but afterwards only before the justices in eyre, by virtue of the statutes of *quo warranto*, 6 Edw. 1, c. 1, and 18 Edw. 1, st. 2 (*y*); but when those justices had given place to the king's temporary commissioners of assize, the judges on the several circuits, this statutory provision lost its effect (*z*); and writs of *quo warranto* (if brought at all) had to be prosecuted and determined before the king's justices at Westminster. In case of judgment for the defendant, he had an allowance of his franchise; but in case of judgment for the crown, for that the party was entitled to no such franchise,

(*t*) Gilb. Hist. of Exch. c. 13.

1534.

(*u*) Finch, L. 322; 2 Inst. 282.

(*y*) 2 Inst. 498; Rast. Entr. 540.

(*x*) Old Nat. Brev. fol. 107, ed.

(*z*) 2 Inst. 498.

or had disused or abused it, the franchise was either seized into the king's hands, to be granted out again to whomsoever he should please; or, if it were not such a franchise as might subsist in the hands of the crown, there was merely judgment of ouster, to turn out the party who had usurped it (*a*).

Information
in the
nature of
quo war-
ranto.

The judgment on a writ of *quo warranto* (being in the nature of a writ of right) was final and conclusive even against the crown (*b*). Which, together with the length of its process, probably occasioned that disuse into which it fell, and introduced the more modern method of prosecution, by information filed in the court of queen's bench by the attorney-general, in the nature of a writ of *quo warranto*; wherein the process is speedier, and the judgment not quite so decisive. This is properly a criminal method of prosecution, as well to punish the usurper by a fine for usurpation of the franchise, as to oust him, or seize it for the crown; but it has long been applied to the mere purpose of trying the civil right, seizing the franchise or ousting the wrongful possessor; the fine being nominal only.

During the violent proceedings that took place towards the end of the reign of King Charles II., it was among other things thought expedient to new-model most of the corporate towns in the kingdom; for which purpose many of those bodies were persuaded to surrender their charters, and informations in the nature of *quo warranto* were brought against others, upon a supposed, or frequently a real, forfeiture of their franchises by neglect or abuse of them. And the consequence was, that the liberties of most of them were seized into the hands of the king, who granted them fresh charters with such alterations as were thought expedient; and during the state of anarchy thus caused, the crown assumed to name their magistrates. This exertion of power, though perhaps *in summo jure* it

(*a*) Cro. Jac. 259; 1 Show. 280.

(*b*) 1 Sid. 86; 2 Show. 47; 12 Mod. 225.

was for the most part strictly legal, gave a great and just alarm; the new-modelling of many corporations being a very great stride towards the establishing of arbitrary power; and therefore it was thought necessary at the revolution to bridle this branch of the prerogative, at least so far as regarded the metropolis, by statute 2 Will. & M. c. 8, which enacts, that the franchises of the city of London shall never afterwards be seized or forejudged for any forfeiture or misdemeanor whatsoever.

This proceeding by information in the nature of a *quo warranto* is now principally applied to the decision of corporation disputes between party and party, without any intervention of the prerogative, in the manner which has already been explained (c). Now applied to the decision of corporation disputes.

6. The prerogative writ of *mandamus* must, in conclusion, be specified as a remedial process analogous to those remedies which have been latterly under our notice. This writ issues from the court of queen's bench, is directed to a person, corporation, or court, and in the sovereign's name commands such person, body corporate, or tribunal, to do a certain specified act, as matter of duty, agreeably to right and justice (d). The writ is meant to be remedial where there would otherwise be a defect of justice, and is not available in lieu merely of the remedy by action (e). We have before considered under what circumstances and how it may be made available against a corporation, and in the last chapter of this Volume we shall briefly notice cases in which it will be granted for the purpose of compelling an inferior court to do justice. 6. Mandamus.

(c) Vol. i. chap. 17.

1016.

(d) Selw. Nisi Prius, 13th ed. ii.

(e) *Id.* p. 1028.

CHAPTER XIV.

THE COURT FOR DIVORCE AND MATRIMONIAL CAUSES.

THIS court, which was constituted by the stat. 20 & 21 Vict. c. 85, was by that act made a court of record, and given exclusive jurisdiction in all causes, suits, and matters matrimonial in England, except in respect of marriage licences. It holds its sittings at Westminster, and numbers amongst its judges, in addition to the judge of the court of probate (*a*) sitting as judge ordinary, the lord chancellor and all the judges of the courts of queen's bench, common pleas, and exchequer.

As the court now under our notice is of recent origin, and as the relief granted by it was never previously granted by any tribunal in the kingdom, it may not be improper to recur shortly to the state of the law as it here existed before its constitution.

In the very early ages of this country, a polygamy of a very curious description appears to have existed. A colony of some ten or twelve men took each of them a woman, and these men and women lived together in common. The children born of this promiscuous connection were common to the whole company, and were supported by the common lot. On the introduction of Christianity, the fathers of the church naturally turned their attention to this promiscuous state of life, and promulgated certain rules setting forth the degrees of affinity within which it was forbidden for persons to marry. These rules, in themselves salutary and just, were after-

(*a*) *Post*, chap. 15.

wards extended to an exaggerated degree in a manner to which I shall shortly advert. And so much so, that as early as the reign of Edward the Confessor, considerable complaints appear to have been made of the clergy, who introduced certain restrictions of marriage which for social causes it was found necessary to discourage (*b*).

Thus matters continued, the clergy, and then the ecclesiastical courts, arrogating to themselves the decision of all matters relating to marriage, and proceeding, on the ground that marriage was a sacrament ordained by the Saviour, to argue that being a sacrament it must be held to be indissoluble. And, indeed, the indissolubility of the marriage contract was upheld by the law of England from the earliest time of which we have record. But, inasmuch as it could not be contended that the commission of adultery, in itself the most flagrant and incontestable breach of the marriage vow, was compatible with the cohabitation of man and wife, it was found necessary to adopt some means to punish the offender, and to relieve the innocent party from the ties and obligations of a contract, already rendered unilateral by the transgression of the other. And the courts accordingly were in the habit of decreeing a separation on the ground of adultery, such separation giving to each party the rights of celibacy, excepting that of contracting a new marriage. But adultery was found to be not the only cause which rendered cohabitation impracticable—cruelty, and some other causes soon appeared to the courts to be just and proper reasons for allowing the separation of man and wife. And such relief was accordingly granted, upon the principle that it would be alike cruel and unjust to compel by force the maintenance of a contract, entered into perhaps with mutual affection and desire, but now virtually rescinded by mutual hatred and disgust.

But men having gained this right of separation, and

(*b*) Lappenberg's History of the Anglo-Saxon Kings, vol. ii. p. 339 (translated by Thorpe).

partial rescission of their marriage contract, began to look forward to these separations with a view to effecting other and more cherished ties. And to meet this growing desire on the part of the population, the ecclesiastical law extended to an extreme limit those degrees of consanguinity and affinity within which it was declared unlawful that matrimony should be contracted. And not only was it held that relations of the blood to the sixth or the seventh degree were incapable of contracting matrimony, but that if either party to the marriage had been pre-contracted to another, the marriage was voidable; and eventually it was declared that if it happened to any man to have carnal connection with a woman, the same relations in regard to affinity were thereby created between them as if an actual marriage had taken place. Upon these grounds of pre-contract, affinity and carnal knowledge, the ecclesiastical law, still upholding the doctrine of the sacramental indissolubility of marriage, extended matrimonial disability far beyond the law of God, and declaring such marriages to have been null and void *ab initio*, separated the parties "*pro salute animarum*," lest they should endanger their souls by living in a state of known sin. A state of things which rendered the position of society most insecure, few men being able clearly to know whether a marriage which had brought wealth, happiness, and children might not in a moment be set aside for a cause unknown to either party at the time of the contract.

Thus matters continued till the time of the Reformation, when the view of the reformers, including Cranmer, was, that a more extended system of divorce should be allowed; and that a second marriage should be permitted after a divorce for adultery. Proceeding upon this view, an act was passed 3 & 4 Edward 6, c. 11 (A.D. 1549), enabling the king to appoint sixteen ecclesiastics, and the same number of laymen, to order and to compile such laws ecclesiastical, as should be thought convenient. Such commis-

sion was accordingly appointed to consider and report upon the subject; and a report was drawn up and published under the title *Reformatio Legum Ecclesiasticarum*. But the king dying before it could be submitted to his approval, this digest, though in itself a most authoritative and valuable work, never received the sanction and imprimatur of the law. It was, however, one of the doctrines of the Reformation, that marriage, though in itself a holy and desirable state, was not to be considered as a sacrament; and it was then for a short time held by the ecclesiastical tribunals, that inasmuch as marriage had ceased to be regarded as a sacrament, and as the indissolubility of marriage was a character that it received as a sacrament, marriage being now simply a civil contract, entered into with the incident of a religious ceremony, it no longer retained the element of indissolubility. And accordingly one or two persons, as we read, were divorced *à vinculo matrimonii*, by sentence of an ecclesiastical court. The question, however, of the power of such courts to dissolve marriage was soon settled by the case of Sir J. Foljambe (c), which came before the star chamber, in the 44th year of queen Elizabeth, A.D. 1601, and decided that the marriage contract retained all the incidents of the sacrament, though it no longer existed as a sacrament itself.

But inasmuch as it is a fundamental doctrine of our law that no wrong exists without a remedy, and as the greatest wrong which can be inflicted upon a man by the profligacy or seduction of his wife was, in fact, unredressed by sentence of an ecclesiastical tribunal, which, though it released him from cohabitation with, and from support of his guilty wife, entailed upon him an involuntary celibacy during her natural life, it was not long before means were devised to remedy this evil. And as it was clear that no judicial authority in the realm had jurisdiction to make such a decree as would enable a man or a woman to marry again, recourse was had to the supreme power of the state—the

(c) *Rye v. Foljambe*, 1 Moore, 683 n., 942.

king, lords, and commons in Parliament assembled—to legislate upon the particular circumstances of the case, and for an exceptional injury, to supply an exceptional remedy.

The earliest applications made to Parliament for such relief as the ordinary Courts of the realm were unable to grant, were founded on very special circumstances. Thus in the case of Mr. Lewknor (St. Tr. vol. xiii. p. 1308), a bill was obtained, not dissolving the marriage so as to enable the parties to marry again, but simply bastardizing such children as were born of the wife while she lived in open adultery; such adultery having been proved before the Ecclesiastical Court. In lord Roos's case (Macqueen's Practice of the House of Lords, p. 551), a bill was passed "to enable lord Roos to marry again," he having been separated from his wife by reason of her adultery, and it being politically desirable to continue the succession from him. In the countess of Macclesfield's case (*id.* p. 574), the aid of the legislature was invoked in consequence of the scandalous and flagrant circumstances of the case. And in the duke of Norfolk's case, A.D. 1694, the question of indissolubility was raised again.

The cases cited and some others became precedents, and in 1701 a bill having been obtained to dissolve a marriage and enable the petitioner to marry again, applications for special legislation became more numerous. Still, however, no steps were taken to reduce the practice of Parliament to any consistency, or to regulate its procedure, and give it somewhat more the character of a judicial than of a legislative tribunal, until the year 1798, when certain resolutions were passed, known as lord Loughborough's Orders.

Lord Lough-
borough's
orders.

By these orders, no petition could be presented to the House, unless an official copy of the proceedings, and of a definitive sentence of divorce, *a mensâ et thoro*, in the ecclesiastical courts, was delivered on oath at the bar of the house at the same time. On the second reading of

the bill, the petitioner was required to attend for the purpose of being examined, if the house should think fit, as to any collusion touching the adultery, or the bill for divorce, or touching the proceedings in the ecclesiastical court, or in any action at law; and also as to whether the wife at the time of the adultery was living with or under the protection and authority of the husband.

In 1809 a further order was made, that no divorce bill should be received without a clause prohibiting the offending parties from intermarrying. This clause, however, though thus insisted on by the lords, was always thrown out by the commons; and no instance exists of a bill containing such a provision becoming law, except in one or two cases where the marriage, if it had taken place, would have been void, by reason of the consanguinity of the parties. And in 1831, it was ordered by the house, that when a trial had been had at *Nisi Prius*, to which the petitioner had been a party, no bill for divorce should be read a second time till the judge before whom the trial or inquiry had taken place, had transmitted a report of such proceeding to be laid on the table of the house.

The proceedings in the ecclesiastical court were commenced by a citation, and both parties being before the court, a statement of the petitioner's case, termed an allegation, was prepared and filed in the cause. This allegation, in several paragraphs or articles, set out at length all the facts upon which the petitioner relied for his decree, and which he was in a position to support by the testimony of witnesses. A copy of this allegation was delivered to the respondent, together with the names of the witnesses to be produced, and a note of the articles on which each was to be examined. A day was then fixed for the examination of witnesses, and an examiner was appointed for the purpose. The examiner, who was for this purpose an officer of the court, having made himself acquainted with the circumstances of the case from perusal of the facts stated in the allegation, proceeded to examine

Proceedings
in the eccle-
siastical
court.

the witnesses brought before him. Such examination being concluded on behalf of the petitioner, and the deposition of each witness having been taken in the form of a narrative, the examiner proceeded to cross-examine him on behalf of the respondent upon interrogatories supplied to him for that purpose. The evidence for the respondent was then given in the same way, upon a responsive allegation; and being taken down by the examiner, was sealed up and retained by him till an order for publication was made, when the court appointed a day for the trial, and counsel were heard, and judgment was given, subject to an ultimate appeal to the Privy Council.

A definitive sentence of divorce, *a mensâ et thoro*, being thus obtained, the petitioner proceeded to lay his case before the house of lords, in accordance with the standing orders before adverted to, and subject to his proving the case, he obtained a bill divorcing him from the bonds of matrimony, and allowing him to marry again. The provisions of the bill, which was very short, were generally these: 1. The marriage was dissolved. 2. The husband was empowered to marry again. 3. He was given the rights of a husband as to any property of an after-taken wife. 4. The divorced wife was deprived of any right she might have as his widow. 5. Her after-acquired property was secured to her as against the husband from whom she was divorced. In the case of the wife obtaining the bill, similar provisions were made in her favour.

In the place of this cumbrous and protracted machinery, there is now provided in the Court for Divorce and Matrimonial Causes a short and easy remedy, and one open to all classes, from its simplicity of character and moderation of expense.

But though the court has been thus instituted to hear and decide on such cases, nothing can deprive the legislature of its inherent power of passing bills of divorce; and since the date of the Divorce Act, 1857, two private Acts of Parliament to divorce *a vinculo* have been granted,

under peculiar circumstances, to gentlemen who petitioned the house for that purpose (*e*).

The relief granted by the Court for Divorce and Matrimonial Causes is of several distinctive characters. It decrees a restitution of conjugal rights in cases of desertion ; it grants a judicial separation in cases of adultery, cruelty, or desertion for two years and upwards ; a dissolution of the marriage in cases of adultery at the prayer of the husband, and in cases of adultery aggravated with certain other offences at the suit of the wife ; and it declares a nullity of the marriage in cases where the marriage appears to be invalid, either by reason of some informality in the celebration, or of some incapacity, either legal or physical, in one or other of the contracting parties ; it also has a power which seems, however, to have fallen into disuse, of pronouncing a decree in a suit of jactitation of marriage, declaring there to be no marriage, and admonishing the defendant to cease from boasting of the alleged marriage ; and it has a power, shared by certain inferior tribunals, of granting an order protecting a wife's earnings from her husband and his creditors in cases where the wife has been deserted. It has also jurisdiction by virtue of the stat. 21 & 22 Vict. c. 93, called the Legitimacy Declaration Act, 1858, to entertain suits enabling persons being natural born subjects of the queen, or whose right to be deemed natural born subjects depends wholly or in part on their legitimacy or on the validity of a marriage, and being domiciled in England or Ireland, or claiming any real or personal estate in England, to establish their legitimacy and the validity of the marriage of their parents and of their grandparents and of themselves, and to make decrees binding on the crown and all other persons to such effect, and further that the applicant has a right to be deemed a natural born subject of the queen.

The Court
for Divorce.

A restitution of conjugal rights is granted in every case Restitution

(*c*) In the cases of Mr. Sandwith and of Mr. Dickinson ; 22 & 23 Vict. Private Acts, not printed.

of conjugal
rights.

where the marriage is established, when the husband and wife are living apart, and where the defending party fails to make out such a case as would entitle him or her to a judicial separation. And with a view to avoid multiplicity of suits, it is competent, though not necessary, for such respondent, at the same time that he or she answers the petition, to pray for and obtain a judicial separation in the same suit. The decree of restitution pronounces for the marriage, admonishes the respondent to take the petitioner home and treat him or her as husband or wife, and to render him or her conjugal rights; and further to certify to the court, within a certain time, that he or she has done so; in default of which an attachment for contempt of court will be issued against the offending party.

Judicial
separation.

By the 16th section of the above-mentioned act (20 & 21 Vict. c. 85), the court has power to grant a judicial separation, which is substituted for the divorce *a mensâ et thoro*, on the ground of adultery, cruelty, or desertion for two years and upwards; the latter being a ground of separation not previously recognised by the ecclesiastical courts.

A separation on the ground of cruelty may be granted at the petition of either husband or wife; but in order to justify such decree, there must be, in the language of an eminent judge (f), "either actual violence committed, attended with damage to life, limb, or health, or a reasonable apprehension of such violence."

Desertion, to be a ground of separation, must be a desertion without cause for two years and upwards, and be contrary to the will and without the consent of the party deserted. And it has been held, upon the construction of this section, that the right accrues to the offended party on the expiration of the two years, so that a *bonâ fide* offer of a return to cohabitation made after that period does not determine the desertion so as to disentitle the aggrieved party to the relief prayed (g).

(f) Dr. Lushington, *Lockwood v. Lockwood*, 2 Curt. 281.

(g) *Cargill v. Cargill*, 27 L. J., P. & M. 69.

The effect of a decree of judicial separation, when obtained, is set out in the 25th and 26th sections of the 20 & 21 Vict. c. 85, and sects. 7 and 8 of the 21 & 22 Vict. c. 108, from which it appears that from the date of the sentence and whilst the separation continues, the wife is to be considered as a feme sole with respect to property of every description which she may acquire or which may come to or devolve upon her, or to which she has or shall become entitled as executrix, administratrix, or trustee, since the sentence of separation, or to which she is possessed or entitled for an estate in remainder or reversion at the date of the decree; and such property may be disposed of by her in all respects as a feme sole, and on her decease the same will, in case she dies intestate, go as the same would have gone if her husband had been then dead; provided, that if she again cohabits with her husband, all such property as she may be entitled to when such cohabitation takes place will be held to her separate use, subject, however, to any agreement in writing made between herself and her husband whilst separate. She is also, whilst so separated, considered as a feme sole for the purposes of contract, and wrongs and injuries, and suing and being sued in any civil proceeding; and her husband is not liable in respect of any engagement or contract she may have entered into, or for any wrongful act or omission by her, or for any costs she may incur as plaintiff or defendant; but where upon any such judicial separation alimony has been decreed or ordered to be paid to the wife, and the same has not been duly paid by the husband, he will be liable for necessities supplied for her use.

The only purpose for which apparently she retains her status as wife is in the exercise of any joint power given to herself and her husband, which she is not prevented, by the operation of the decree, from joining with him in giving effect to (*h*).

(*h*) *Ib.* s. 26.

Such decree of separation may, however, at any time be reversed upon the ground that it was obtained in the absence of the party affected by it, and upon its being further shown, where desertion was the ground of the decree, that there was reasonable ground for the desertion alleged. Until such reversal however, the decree is valid and effectual for the protection of any person or corporation who shall deal with the wife; and no discharge, variation, or reversal of the decree will prejudice or affect any rights or remedies which any person would have had in case the same had not been so reversed, varied, or discharged in respect of any debts, contracts, or acts of the wife incurred, entered into, or done between the times of the making such decree and its discharge, variation, or reversal (*i*). And all persons and corporations who, relying on such decree, make payments to, or deal with, the wife, are protected by such order, though it be at the time actually reversed or varied, unless at the time of such payment or other dealing with the wife such persons or corporations had notice of the reversal or variation of the decree (*k*).

Maintenance of the wife.

Incident to the granting of a decree of judicial separation is the power of the court to make orders for the future maintenance of the wife and for the custody and maintenance of the children. The ecclesiastical courts acting upon the principle that all property is *prima facie* vested in the husband, and that the wife is entitled to be supported according to the means of her husband during the pendency of the suit, and treating her during such suit as an innocent party, whether prosecuting or defending, allotted her alimony *pendente lite*, varying very considerably in amount according to the position of the parties and the circumstances of the case. This equitable principle has been adopted by the court for divorce, and with a view to the convenience of having the practice in these cases as far as possible settled, it is the usual, but not inflexible rule, to

(*i*) 21 & 22 Vict. c. 108, s. 8.

(*k*) *Ib.* s. 10.

allow the wife, by way of alimony *pendente lite*, one-fifth of the joint incomes of the husband and wife. On the termination of the suit, if in favour of the wife, the practice usually is to allot her from a quarter to one-third of the joint incomes by way of permanent alimony, the husband being at liberty, in the event of his income diminishing, to move for a decrease of the allotment, and the wife, on the other hand, being at liberty, if necessary, to move for a proportionate increase.

In every case, also, in which the court makes any decree or order for alimony, it may direct the same to be paid either to the wife herself or to any trustee on her behalf, to be approved by the court, and may impose any terms or restrictions which it may deem expedient, and may from time to time appoint a new trustee, if for any reason it appears to the court expedient so to do (*l*).

In regard to the children of the marriage the court has vested in it by the 35th section of the 20 & 21 Vict. c. 85, a power exceeding that exercised by the courts of law or equity, for by it the court is empowered to make such interim and final orders with respect to the custody, maintenance, and education of the children of the marriage as it may deem just and proper, and may, if it thinks fit, direct proceedings to be taken for placing the children under the protection of the court of chancery. In carrying out the provisions of this section the court recognises the common law right of the father to the custody of his children, and, unless for very good reasons, does not interfere with such custody. During the pendency of the suit, both parties are usually allowed reasonable access to the children, in whose custody soever they may be; and in the result their custody, if prayed for, is usually committed to the party who is found to be innocent, with such orders for the other party to have access to them as it may consider fair to the parents and

Custody and maintenance of the children.

(*l*) 20 & 21 Vict. c. 85, s. 24.

not prejudicial to the interests of the children themselves. In the case of a mother who is proved guilty of adultery, she is usually debarred from such access, though it has not been the practice to treat the offending father with the same rigour. And where it has appeared that the party succeeding in the suit is not the person to whom it would be for the interests of the children themselves that their custody should be entrusted, some third persons willing to undertake their care and approved of by the court have been appointed their guardians, and an allowance made to them for their support (*m*).

Dissolution
of marriage.

The most important function of the court is, however, in the granting of decrees of dissolution of marriage. And for this purpose any husband may present a petition to the court, praying that his marriage may be dissolved, on the ground that his wife has since the celebration thereof been guilty of adultery; and any wife may present a petition praying that her marriage may be dissolved, on the ground that since the celebration thereof her husband has been guilty of incestuous adultery, or of bigamy with adultery, or of rape, or of sodomy or bestiality, or of adultery coupled with such cruelty as without adultery would have entitled her to a divorce *à mensâ et thoro*, or of adultery coupled with desertion without reasonable excuse, for two years or upwards; incestuous adultery being taken to mean adultery committed by a husband with a woman with whom if his wife were dead he could not lawfully contract marriage by reason of her being within the prohibited degrees of consanguinity or affinity, including, therefore, adultery with the wife's sister; and bigamy being taken to mean marriage of any person, being married, to any other person during the life of the former husband or wife, whether the second marriage shall have taken place within the dominions of Her Majesty or elsewhere (*n*).

(*m*) *Chetwynd v. Chetwynd*, 1 L. (n) 20 & 21 Viet. c. 85, s. 27.
R. P. & M. 39.

Upon any such petition it becomes the duty of the court, following in this respect the practice of the houses of parliament, to satisfy itself, so far as it reasonably can, not only as to the facts alleged, but also whether or no the petitioner has been in any manner accessory to or conniving at the adultery, or has condoned the same, and also to inquire into any counter-charge which may be made against the petitioner (*o*).

In case the court, on the evidence in relation to any such petition, is not satisfied that the alleged adultery has been committed, or finds that the petitioner has during the marriage been accessory to or conniving at the adultery of the other party to the marriage, or has condoned the adultery complained of, or that the petition is presented or prosecuted in collusion with either of the respondents, then and in any of the said cases the court is bound to dismiss the petition (*p*).

If, however, it is satisfied on the evidence that the case of the petitioner has been proved, and does not find that the petitioner has been in any manner accessory to or conniving at the adultery of the other party to the marriage, or has condoned the adultery complained of, or that the petition is presented or prosecuted in collusion with either of the respondents, then the court is bound to pronounce a decree declaring such marriage to be dissolved. It is, however, expressly provided that the court shall not be bound to pronounce such decree if it shall find that the petitioner has during the marriage been guilty of adultery, or if the petitioner shall, in the opinion of the court, have been guilty of unreasonable delay in presenting or prosecuting such petition, or of cruelty towards the other party to the marriage, or of having deserted or wilfully separated himself or herself from the other party before the adultery complained of, and without reasonable excuse, or of such

(*o*) 20 & 21 Vict. c. 85, s. 29.

(*p*) *Ib.* s. 30.

wilful neglect or misconduct as has conduced to the adultery (*q*).

With regard, therefore, to the position of a husband, he is entitled to have his marriage dissolved on account of the adultery of his wife, provided his own conduct has not been such as to bring him within the prohibitory clauses of the Act.

With regard to the wife's position, it is only necessary to remark that the bigamy with adultery contemplated by the statute has been construed to mean adultery committed with the person with whom the bigamy has been committed (*r*).

Bars to the
suit.

It will be observed that there are two distinct classes of bars to the applicant's right to have a dissolution of marriage, of which one class are peremptory bars, binding the court to dismiss the petition, and the other addressed to the discretion of the court, to be exercised according to the circumstances of each particular case. Thus, according to the 30th section, a failure of proof, the petitioner's connivance at, or condonation of, the adultery, or the presenting or prosecuting of the suit in collusion with either of the other parties to it, compel the court to dismiss the suit; while under the 31st section, the adultery of the petitioner, or his or her unreasonable delay in presenting or prosecuting the petition, or cruelty, desertion, or wilful neglect and misconduct conduced to the adultery complained of, are only so far bars to the suit that the court is not bound to pronounce a decree of dissolution if it finds any of such offences to be established. The discretion, however, which is thus vested in the court is a judicial and not an arbitrary discretion, and as such, certain rules have been laid down by the judges of the court for their guidance in the exercise of this discretion. Thus, as to the adultery of the petitioner, some special circumstances must appear so as to bring it

(*q*) 20 & 21 Vict. c. 85, s. 31.

(*r*) *Horne v. Horne*, 27 L. J. P. & M. 50.

within the discretionary clause, either that it was committed in ignorance of the existence of the respondent, or where the petitioner *bond fide* though wrongfully believed that his marriage had been dissolved, or where the adultery complained of had occurred many years ago, and was known to and condoned by the wife(s). As to the unreasonable delay, it must be of such a nature as to make it appear that the petitioner was insensible to the injury of which he complains (*t*). And misconduct conducing to the adultery must amount to a breach of some marital duty, and be of such a character that it might fairly be contemplated by the petitioner as likely to lead to the commission of adultery (*u*).

Before the passing of the 20 & 21 Vict. c. 85, the alleged adulterer was no party to the suit in the ecclesiastical court, nor was he represented before the parliamentary committee who took the Divorce Bill into their consideration; now, however, by the 28th section of the Act, the petitioner is bound to make the alleged adulterer a co-respondent to the petition, unless, upon special grounds to be allowed by the court, he is excused from doing so, and being thus a party to the suit, the court has the power to make such order upon him as to payment of the whole or any part of the costs of the proceedings as it may think fit (*x*). The court has power also, in the case of a wife's petition, to make the woman with whom the husband is alleged to have committed adultery a party to the suit, with a view no doubt under certain circumstances of condemning her in costs.

The decree in the first instance is a decree *nisi*, and not made absolute for a period of six months from the date thereof, within which time the queen's proctor, on the direction of the attorney-general, by virtue of his office,

Alleged adulterer a party to the suit.

Decree absolute. Intervention.

(*s*) *Morgan v. M. and Porter*, 1 L. R. P. & M. 644.

(*u*) *Cunnington v. Cunningham and Noble*, 28 L. J. P. & M. 101.

(*t*) *Pellw v. Pellew and Berkeley*, 29 L. J. P. & M. 44.

(*x*) *Ib.* sect. 51.

or any other member of the public, may intervene in the suit and show cause why the decree should not be made absolute by reason of the same having been obtained by collusion or by reason of material facts not brought before the court; and, on cause being so shown, the court will deal with the case by making the decree absolute, or by reversing the decree *nisi*, or by requiring further inquiry, or otherwise as justice may require; and at any time during the progress of the cause or before the decree is made absolute any person may give information to the queen's proctor of any matter material to the due decision of the case, who may thereupon take such steps as the attorney-general may deem necessary or expedient; and if from any such information or otherwise the queen's proctor suspects that any parties to the suit are or have been acting in collusion for the purpose of obtaining a divorce contrary to the justice of the case, he may, under the direction of the attorney-general, and by leave of the court, intervene in the suit, alleging such case of collusion, and retain counsel and subpoena witnesses to prove it; and the court may order the costs of such counsel and witnesses, and otherwise, arising from such intervention, to be paid by the parties or such of them as it shall see fit, including a wife, if she have separate property (*y*). The right, however, to make the parties to a suit pay costs to the crown when the petition is dismissed is confined to cases where the queen's proctor has alleged and proved a case of collusion. In all other cases where the queen's proctor intervenes, the recognised rule prevails, that the crown neither pays nor receives costs (*z*).

By the 20 & 21 Vict. c. 85, a dissolution of the marriage could only be pronounced by the full court of divorce, consisting of three judges of the court, the judge ordinary being one (*a*); now, however, the judge ordinary may

(*y*) 23 & 24 Vict. c. 144.

J. P. & M. 89.

(*z*) *Lautour v. The Q. Pr.*, 33 L.

(*a*) Sect. 10.

sit alone to hear and determine all matters arising in the court, and may exercise all powers and authority whatever which might previously have been heard and determined and exercised respectively by the full court or by three or more judges of the said court, the judge ordinary being one, or where the judge ordinary deems it expedient, in relation to any matter which he might hear and determine alone by virtue of this act, he may have the assistance of one other judge of the court, and sit and act with such one other judge accordingly, and, in conjunction with such other judge, exercise all the jurisdiction, powers, and authority of the court (*b*).

The judge ordinary can thus hear petitions for dissolution or for nullity of marriage, arguments on bills of exceptions, special verdicts, and special cases. He can also try questions under the Legitimacy Declaration Act, 1858, and he may grant or refuse a rule for a new trial, such order, however, being subject to an appeal to the full court (*c*).

On a decree for a dissolution of marriage being pronounced at the suit either of the husband or the wife, the court may order the husband to secure to the wife such gross sum of money, or such annual sum of money for any term not exceeding her own life, as, having regard to her fortune (if any), to the ability of the husband, and to the conduct of the parties, it shall deem reasonable, and for that purpose may refer it to any one of the conveyancing counsel of the court of chancery to settle and approve of a proper deed or instrument to be executed by all necessary parties; and may suspend the pronouncing of its decree until such deed shall have been duly executed (*d*); and in cases where a husband has no property on which a gross sum or an annual payment could be secured, it may make an order upon the husband for weekly or monthly

Maintenance of the wife.

(*b*) 23 & 24 Vict. c. 144, s. 1.

(*d*) 20 & 21 Vict. c. 85, s. 32.

(*c*) *Ib.* s. 2.

payments, with power from time to time to discharge, modify, or suspend the order as it may think fit (*e*).

On a decree at the suit of the husband, where the wife is entitled to property either in possession or reversion, the court may order such settlement as it thinks reasonable to be made of such property, or any part thereof, for the benefit of the innocent party, and of the children of the marriage, or either or any of them, and such settlement will be valid, notwithstanding the existence of the disability of coverture at the time of its execution (*f*). The power of the court, it will however be observed, is limited to those cases in which there is issue of the marriage living at the time of the pronouncing of the decree (*g*); a limitation reasonable enough where there are children, but entirely without reason where the marriage has been fruitless, or where, having been children, they have died before the pronouncing of the decree.

Alteration
of marriage
settlements

Where, also, there is issue living of the marriage, the court, after a final decree of dissolution of marriage, has power, which it has not in cases of judicial separation, to inquire into the existence of ante-nuptial or post-nuptial settlements made on the parties whose marriage is the subject of the decree, and to make such orders with reference to the application of the whole or a portion of the property settled, either for the benefit of the children of the marriage or of their respective parents, as it considers just and fit (*h*). The court, in acting upon the power thus conferred upon it, looks to the interests of the children as well as to the position and the conduct of the parties; and while it lays down no inflexible rule upon the subject, it is the practice, in respect of property settled by the petitioner, to order the trustees of the settlement to deal with the portion of the trust funds so settled as if

(*e*) 29 Vict. c. 32, s. 1.

(*f*) 20 & 21 Vict. c. 85, s. 45;
23 & 24 Vict. c. 44, s. 6.

(*g*) *Bacon v. Bacon and Bacon*, 2

Sw. & Tr. 86; *Corrance v. Corrance*
and *Lowe*, 1 L. R. P. & M. 495.

(*h*) 22 & 23 Vict. c. 61, s. 5.

the respondent were dead at the time of the order; and with regard to the property settled by the respondent, either to leave it to follow the trusts of the settlement, or to subject it to such payments to or for the benefit of the petitioner and the children as reason and justice may require (*i*).

There is also the same power of making orders for the custody, maintenance, and education of children as in a suit for judicial separation.

The action for criminal conversation, before alluded to (*k*), has been abolished (*l*); but a husband may, in a suit for judicial separation, or for a dissolution of his marriage, or in a suit limited to that object only, claim damages from the adulterer, and the suit, as regards him, will be tried, and the damages assessed by a jury, upon the same principles as actions for crim. con. were formerly tried. This important alteration has, however, been introduced, that whereas the damages recovered formerly went to the plaintiff, the court may now direct in what manner such damages shall be applied, and may direct the whole or any part to be settled for the benefit of the children (if any), or as a provision for the maintenance of the wife (*m*). And where the adulterer has been made a party to the suit, as for this purpose he must necessarily be, the court may order him to pay the whole or any part of the costs of the proceedings (*n*). Claim for damages.

A decree absolute for the dissolution of the marriage Appeal. having been made, either party dissatisfied with the final decision of the court may, within one calendar month after the pronouncing thereof, appeal therefrom to the house of lords, and on the hearing of any such appeal, the house of lords may either dismiss the appeal, or reverse the decree, or remit the case to be dealt with in all respects

(*i*) *March v. March and Polumb*,
1 L. R. P. & M. 440.

(*k*) *Ante*, p. 397.

(*l*) 20 & 21 Vict. c. 85, s. 59.

(*m*) *Ib.* s. 33.

(*n*) *Ib.* s. 34.

as the house of lords shall direct: no respondent or co-respondent, however, not appearing and defending the suit on the occasion of the decree *nisi* being made, has any right of appeal to the house of lords against the decree when made absolute, unless the court, upon application made at the time of the pronouncing of the decree absolute, sees fit to permit an appeal (*o*).

When the time for appealing against any decree dissolving a marriage has expired, and no appeal has been presented, or when any such appeal has been dismissed, or when in the result of any appeal any marriage shall have been declared to be dissolved, or when, as above stated, there is no right of appeal, then, immediately after the decree absolute, the respective parties may marry again, as if the prior marriage had been dissolved by death (*p*). A marriage, therefore, by a divorced person with his divorced wife's sister, or any other person within the prohibited degrees of affinity through the wife, would be illegal.

Nullity of
marriage.

A sentence of nullity of marriage may be obtained either by reason of the parties being within the prohibited degrees of affinity or consanguinity, by reason of a previous existing marriage, by reason of the mental incapacity of one or both of the parties at the time of the marriage, by reason of the failure of compliance with statutable requirements, or by reason of the physical incapacity of either party to perform the duties of marriage.

Affinity.

By 5 & 6 Will. 4, c. 54, all marriages celebrated after the 31st day of August, 1835, between persons within the prohibited degrees of consanguinity or affinity, are absolutely null and void to all intents and purposes whatsoever. Before the passing of that act such marriages were only voidable during the lifetime of the parties.

Affinity exists between illegitimate as well as legitimate relations (*q*), but it is not created by the mere fact of

(*o*) 31 & 32 Vict. c. 77, s. 3.

(*q*) *Horner v. Horner*, 1 Hag.

(*p*) 20 & 21 Vict. s. 85, s. 57; 31 Con. 353.

& 32 Vict. c. 77, s. 4.

sexual intercourse, though for some time a contrary opinion prevailed (*r*).

In cases of bigamy, it is often prudent to obtain a declaration of nullity of marriage, even after there has been a conviction of bigamy against the offending party, as the person so convicted is not thereby estopped from asserting at a future time the validity of his second marriage (*s*), in answer to which the bigamy itself must be proved, proof of a conviction of that offence not being conclusive evidence of the fact of bigamy. Bigamy.

Both parties to a marriage must, at the time of its celebration, be of a mind capable of giving a binding consent thereto. The law fixes the age at which such consent may be given in males at fourteen years, and in females at twelve, considering a consent given by either party when under that age revocable by either on attaining fourteen or twelve years. In cases of persons over the respective ages of twelve or fourteen years, a marriage may be annulled by reason of the insanity or imbecility of one or both of the parties contracting (*t*), or on account of fraud (*u*), and a suit may be instituted by a sane person to set aside a marriage contracted by him during a period of insanity (*v*). Want of consent.

A marriage may also be set aside for non-compliance with the Marriage Acts. The stat. 4 Geo. 4, c. 76, s. 22, enacts, that if any persons shall knowingly and wilfully intermarry in any other place than a church or such public chapel wherein banns may be lawfully published, unless by special licence, or shall knowingly and wilfully intermarry without due publication of banns or licence from a person or persons having authority to grant the same first had and obtained, or shall knowingly and wil-

(*r*) *Wing v. Taylor*, 2 Sw. & Tr. Hagg. Ecc. 356.
278; S. C. 30 L. J. P. & M. 258.

(*u*) *Harford v. Morris*, 2 Hagg. Con. 436.

(*s*) *Searle v. Price*, 2 Hagg. Con. 192.

(*v*) *Turner v. Myers*, 1 Hagg. Con. 417.

(*t*) *Portsmouth v. Portsmouth*, 1

fully consent to or acquiesce in the solemnisation of such marriage by any person not being in holy orders, the marriage of such persons shall be null and void to all intents and purposes whatsoever.

The 8th section of the same act declares that when the parents or guardians, or one of them, of a minor openly and publicly declare, or cause to be declared, in the church or chapel where the banns are published, at the time of such publication, his or her or their dissent to such marriage, such publication of banns shall be absolutely void.

Undue publication of banns.

First, then, with regard to undue publication of banns. In these cases both parties must be aware of the undue publication, or of the non-publication, of the banns at some time before the celebration of the marriage (*x*): so that when an undue publication takes place, but is known only to one of the parties until after the marriage, such undue publication does not work a nullity (*y*).

The great object in these cases is to obtain publicity, and to give to those persons interested an opportunity, if they think fit, of objecting to the marriage. And for this reason, a publication of banns in a man's name of reputation, though not of birth, may, under some circumstances, be valid (*z*). And the omission of a christian name by which the party is not generally known,

(*x*) *Tongue v. Allen*, 1 Curt. 38; 1 M. P. C. 90; *Wright v. Elwood*, 1 Curt. 49 & 662; *Midgely v. Wood*, 30 L. J. P. & M. 57.

(*y*) *Rex v. Monton*, 16 B. & Ad. 640. As instances of an undue publication, it may be mentioned that where the christian name of John was substituted for that of Bower (*Midgely v. Wood*, 30 L. J. P. & M. 57); where one of the christian names commonly used by the party was omitted (*Pouget v. Tomkins*, 1 Phill. 499; 2 Com. 142;

Wiltshire v. Prince, 3 Hagg. Ecc. 332); where the surname Widowcroft was used for that of Meadowcroft (*Meadowcroft v. Gregory*, 2 Phill. 365); and where an illegitimate person was described by the name of her putative father, or that of her mother, and not by the name she always bore (*Wilson v. Brockley*, 1 Phill. 132; *Tooth v. Barrow*, 1 Ecc. & Ad. 371), the publication has been held to be undue.

(*z*) *Diddlear v. Faucit*, 3 Phill. 580.

will not always invalidate the marriage (*a*). So, also, in the case of an illegitimate person, the use of the name of the mother in addition to that of the putative father by which the party was generally known (*b*), and a publication in the name of the mother, though the party had during her life passed by several other names (*c*), has been held to be a sufficient compliance with the statute.

In a marriage by licence the identity of the parties using the licence is the important point to establish, in contradistinction to a marriage by banns, where the due publication is the material consideration (*d*). And so much so, that when the name of one of the parties is wrongly inserted in the licence, though for the express purpose of concealment, the marriage had by virtue of such licence is not invalidated (*e*). Neither will the fact of the licence being granted by a person not duly authorised to do so invalidate a marriage had by virtue of it, unless both parties at the time of the marriage know of the incompetency of the party so granting it (*f*).

When both parties consent to or acquiesce in the solemnization of matrimony by a person not in holy orders, or where a minor is married contrary to the express dissent of parent or guardian, openly and publicly declared at the time of the publication of banns in the place where such banns are published, a marriage celebrated by such person, or after such declaration of dissent, is null and void.

Save as above, the want of consent, in the case of a minor, does not affect the validity of the marriage (*g*).

(*a*) *S. C.*, 3 Phill. 583; see 2 Con. 143.

(*b*) *Sullivan v. Oldacre*, 2 Con. 238; *S. C.*, 3 Phill. 45.

(*c*) *Wakefield v. Mackay*, 1 Con. 394; *S. C.*, 1 Phill. 134.

(*d*) *Ewing v. Wheatley*, 2 Con. 184.

(*e*) *Clowes v. Clowes*, 3 Curt. 185; *Bevan v. McMahon*, 2 Sw. & Tr. 58;

S. C., 30 L. J. P. & M. 61.

(*f*) *Dormer v. Williams*, 1 Curt. 870.

(*g*) *Diddear v. Faucit*, 3 Phill. 581.

Marriage by
licence.

Physical incapacity.

The court can also, subject to an appeal to the house of lords (*h*), decree a nullity of marriage, by reason of the physical incapacity of either of the parties. When such incapacity is in the nature of congenital malformation, proof of such fact is sufficient without any specified period of cohabitation to found the decree. When there is no such impediment, the court requires evidence of a sufficiently long cohabitation without consummation of the marriage, to satisfy it that such non-consummation arises from some defect of a permanent and incurable nature. The ecclesiastical courts formerly required a triennial cohabitation in such cases; latterly, however, the rule has been much relaxed, the admissibility of the parties themselves as witnesses in these suits rendering such strict precaution no longer necessary.

Protecting order.

A wife deserted by her husband may at any time after such desertion, if resident within the metropolitan district, apply to a police magistrate, or if resident in the country to justices in petty sessions, or in either case to the divorce court, for an order to protect any money or property she may acquire by her own lawful industry, and property which she may become possessed of, after such desertion, against her husband or his creditors, or any person claiming under him; and such magistrate or justices or court, if satisfied of the fact of such desertion, and that the same was without reasonable cause, and that the wife is maintaining herself by her own industry or property, may make and give to the wife an order protecting her earnings and property acquired since the commencement of such desertion, from her husband and all creditors and persons claiming under him. Such earnings and property then belong to the wife as if she were a *feme sole*, and if the husband or any creditor of or person claiming under the husband seizes or continues to hold any property of the wife after notice of any such order, he is liable, at the

(*h*) 20 & 21 Vict. c. 85, s. 56; 21 & 22 Vict. c. 108, s. 17.

suit of the wife (which she is empowered by the statute to bring), to restore the specific property, and also for a sum equal to double the value of the property so seized or held after such notice. During the continuance of such order the wife is, and is deemed to have been, during such desertion of her, in the like position in all respects, with regard to property and contracts, and suing and being sued, as she would be if she obtained a decree of judicial separation (*i*). And the order, in addition to protecting property acquired by her own lawful industry, or of which she may become possessed after the desertion, protects such also as she may become entitled to as executrix, administratrix, or trustee, after the commencement of the desertion (*k*); and also any property to which she is entitled in remainder or reversion at the date of the desertion (*l*).

Every order must state the time at which the desertion, in consequence of which the order is made, commenced; and such statement is conclusive as regards third persons dealing with the wife (*m*). All persons and corporations who, in reliance on such order, make payments to, or permit transfers or acts to be done by the wife, being protected by the order, though such order be actually discharged or reversed at the time of the payment, transfer, &c.: provided that at the time of their dealing with the wife such persons acted without notice of the reversal or discharge (*n*).

The order, if made by a police magistrate or by justices at petty sessions, must, within ten days of the making, be entered with the registrar of the county court within whose jurisdiction the wife is living (*o*). This proviso, however, is directory, and not imperative; so that the will of a married woman who has obtained such an order

(*i*) 20 & 21 Vict. c. 85, s. 21.

(*k*) 21 & 22 Vict. c. 108; s. 7.

(*l*) *Ib.* s. 8.

(*m*) *Ib.* s. 9.

(*n*) *Ib.* s. 10.

(*o*) 20 & 21 Vict. c. 85, s. 20.

is valid, though the order may not have been registered within the time specified (*p*).

Procedure. Having thus treated of the relief which the court has the power to grant, it becomes necessary to inquire shortly into its ordinary course of procedure. With regard to all suits and proceedings, other than proceedings for dissolving a marriage, the court is bound to act and to give relief upon the principles and rules which in its opinion are as nearly as possible conformable to the principles and rules on which the ecclesiastical courts formerly acted, and gave relief in such suits, subject, however, to certain alterations in the procedure directed by the act constituting the court, and controlled by the rules and orders made by virtue of the powers conferred on the judge ordinary.

The procedure of the court is by petition and answer, the petition setting out shortly in paragraphs the petitioner's case, and concluding with a prayer for such relief as is sought; and the answer setting out in paragraphs the answer to the charges made by the petitioner, and any counter charges which may be necessary for the respondent to make, either for the purpose of obtaining a dismissal of the petition, or for obtaining relief for injuries under which he or she is supposed to suffer. The petitioner has then the same right of pleading in reply, and the respondent of re-joining as now exists in common law pleadings. And the same right of pleading applies to a co-respondent or other person made a party to the suit. The petition and the answer, where the latter contains anything more than a traverse of the matter alleged in the petition, are supported by an affidavit of the party verifying the contents. The pleadings being concluded, the judge directs the mode in which the case is to be tried. In cases of dissolution of marriage, either of the parties may claim to have the disputed

questions of fact tried by a jury; and for this purpose the court has a similar power of summoning juries to that possessed by the common law courts. Subject to any order which the judge may make, the witnesses, in all proceedings before the court where their attendance can be had, must be sworn and examined orally in open court. The court may, however, give liberty to the parties to verify their cases in whole or in part by affidavit, subject to the liability of the deponent in every such affidavit to be cross-examined by or on behalf of the opposite party orally in open court. Trials upon affidavit, however, are very rarely permitted except in case of a petition for a dissolution of marriage on the ground of bigamy, where the respondent has been already tried and convicted of the bigamy which is the foundation of the suit. And in cases where the marriage has taken place abroad, and the validity of the marriage is not one of the questions in the suit, the court usually permits such marriage, and the identity of the parties to it, to be proved by affidavit.

In proceedings other than those for a dissolution of marriage, it is lawful for the court, but not obligatory upon it, to direct the truth of any question of fact arising in the suit to be tried before itself, or before any of the judges of the court, by the verdict of a special or a common jury (q). The court may also direct an issue to be tried in any court of law, either before a judge of assize, or at the sittings in London or Middlesex, as is now done by the court of chancery; and the rules of evidence observed in the superior courts of common law at Westminster are applicable to and observed on the trial of all questions of fact in the court.

By Lord Brougham's Act (14 & 15 Vict. c. 99), and Evidence.
by the Amendment Act (16 & 17 Vict. c. 83), no party to a suit instituted in consequence of adultery, nor

(q) 20 & 21 Vict. c. 85, s. 36.

the husband or wife of such party, is a competent witness in the suit; thus excluding the evidence of all parties to a suit for a dissolution of marriage, or for a judicial separation where adultery is charged in the petition. But when a wife became entitled to a dissolution of her marriage on proving her husband's adultery, coupled with either his desertion or his cruelty towards her; and it was clear that the only person who could give satisfactory evidence of such cruelty and of such desertion would in most instances be the wife herself, the 22 & 23 Vict. c. 61, s. 6, made the husband and wife respectively competent and compellable to give evidence of or relating strictly to such cruelty or desertion, on any petition presented by a wife for a dissolution of her marriage by reason of her husband's adultery, coupled with cruelty or desertion. A previous modification of the above-mentioned acts was also effected by the 43rd sect. of the 20 & 21 Vict. c. 85, by which the court may, if it think fit, order the attendance of the petitioner, and may examine him or her, or permit him or her to be examined or cross-examined on oath upon the hearing of the petition. No such petitioner is, however, bound to answer any questions tending to show that he or she has been guilty of adultery.

There had, however, been for some time past a very strong feeling in the minds of many persons that any restrictions on the competency of persons to give evidence in suits affecting themselves were contrary to justice and public policy, and, accordingly, the legislature in the last session of parliament passed an act doing away with such restrictions and rendering all parties in suits instituted in consequence of adultery, and their husbands or wives, competent to give evidence in relation to such suits (*r*); so that, for the future, we may anticipate in every suit to be tried in the divorce court, that the

(*r*) 32 & 33 Vict. c. 68, s. 3.

parties in a contested case will be called in support of their respective averments, and that, in their absence, the presumption which usually attaches to the absence of a party from the witness-box will apply against them.

The case having been heard, either before the judge Appeal. himself, or before the judge with a jury, as may be directed, a decree is pronounced, subject, in suits for a dissolution and for nullity of marriage, to an appeal to the House of Lords, and in other cases to an appeal to the full court. A new trial or a rehearing may be moved for and granted by the judge ordinary alone, but the rule granting or refusing a new trial is subject to an appeal to the full court.

The costs of the suit are in the absolute discretion of the court, no appeal lying on the question of costs alone.

The court also grants inspection of documents, and Practice. is in the habit, in cases where it is necessary to do so, to make orders on the parties to attend either at the trial or before the registrar of the court, for the purpose of being identified. There is also a power to tender a bill of exceptions, and to have a special verdict returned, or a verdict subject to a special case, as in the courts of common law, to be argued before the judge ordinary. The court has also power, pursuant to the statute, to issue a commission, or to give orders for the examination of witnesses out of the jurisdiction, or unable by reason of illness or otherwise to attend at the trial.

In suits where the wife is dependent either wholly or mainly upon her husband for support, the court, following the practice adopted by the House of Lords, orders the husband to pay, or to secure to the satisfaction of the registrar of the court, such sum as he may consider necessary to enable her to prosecute or defend the suit, and at the termination of the suit makes such order as to the money so paid or secured as it may think reasonable: but, in practice, this being a matter more between the wife's solicitor and the husband than between the wife

and her husband, it is usual, in cases where no misconduct has been brought home to the wife's solicitor, to allow him, as against the husband, the costs incurred by the wife, at all events up to such sum as the court has ordered to be secured as above-mentioned. There is also a power to permit suits to be instituted and defended *in formâ pauperis*, and to dispose, upon summons, of any matters of minor importance arising in the course of the suit.

Enforcing
decrees and
orders.

The decrees and orders of the court are enforceable in the same manner as judgments or decrees of the court of chancery, viz., by attachment, or by sequestration.

CHAPTER XV.

THE COURT OF PROBATE.

By the 20 & 21 Vict. c. 77, called "The Court of Probate Act, 1857," all the jurisdiction and authority of the ecclesiastical courts, in respect of the granting and revocation of probates of wills and letters of administration in England, was taken from such courts and granted to a court holding its sittings in London, and called the court of probate. This court is presided over by a judge who ranks with the judges of the superior courts of common law, and as Judge Ordinary of the Divorce Court has precedence in his Court next after the Lord Chief Baron, and who is assisted in his duties by four registrars and a secretary, in addition to the other usual officers of a court. The court exercises jurisdiction over the granting of probates and letters of administration, and determines all questions relating to matters in testamentary cases, and its business usually consists in pronouncing upon the validity of wills and codicils, and deciding, in cases of intestacy, upon the person to whom the administration of the deceased's estate is to be committed. Formerly this function was exercised by different courts throughout the country, those of the several dioceses having power to grant probate and administration when a person died having goods within their jurisdiction. But questions of difficulty and expense frequently arose as to which of the courts had the right of making such grant and receiving the fees payable thereon, the right depending mainly upon the question of whether the deceased person had personal estate, or

what was then called *bona notabilia* within the jurisdiction of the particular court. Now, however, such questions no longer arise, for the court at Westminster, by means of its different registries in London and throughout the country, has jurisdiction to grant probate and letters of administration in all cases where a person has died leaving personal estate in this country. By the institution of this court a state of things, also, which was anomalous and discreditable to the legal procedure of the country has been rectified, for the probate of a will, as granted by the ecclesiastical court, was only binding upon the personal estate of the testator, and was not conclusive in regard to his real estate; and this, although the testator might by such will have appointed an executor, and formally have devised his lands to the person for whose benefit he intended them. And, accordingly, it was not an uncommon occurrence for the same will disposing of the real and the personal estate of the testator, to be held a valid will when contested in the ecclesiastical courts on the question of the administration of the personalty, and to be declared an invalid will when contested in an action of ejectment brought by the heir-at-law for the recovery of the lands so devised by the testator from the person to whom he had devised them. Now, however, where proceedings are taken to dispute the validity of a will, or for the purpose of proving it in solemn form of law, where the will affects the real estate, the heir-at-law, devisees, and other persons having or pretending interest in the real estate affected by the will, are made parties to the suit, and are bound by the decree pronounced in it.

Proof of
wills.

A will may be proved by the executor, if an executor is appointed in the will, at his option, either in common form—in which case the probate may at any time afterwards be called in and disputed—or in solemn form, when he is compelled to cite the next-of-kin, and other persons adversely affected by the will, after which it cannot at any future time be disputed by the persons so cited, or

by persons claiming under or through them. Similarly, it may be proved by the residuary legatee, in case no executor is appointed, and if no residuary legatee is named, then by the next-of-kin or by a legatee.

Where an executor is appointed in a will, and he declines or takes no step towards proving it, he may be cited by the persons interested under the will to show cause why he should not take probate: and if, upon such citation, he either renounces probate, or does not appear, then his right in respect of his executorship entirely ceases, and the representation of the testator, or the administration of his effects, will go in such manner as if he had not been appointed executor (*a*).

In speaking of a will, the term "will" must be taken to include one or more codicils, because a man's will may consist not only of that portion of his testamentary papers which is commonly called *his will*, but of any number of testamentary papers, not inconsistent with each other, from the whole of which, taken together, his intentions are to be drawn; and all that is necessary to entitle papers to probate as a will, apart from the question of due execution, is that they should have been written in the lifetime of the deceased, and contain his final wishes as to the disposition of his estate after his death. But in citing an executor to take probate of a will, there being a will and one or more codicils, it is competent to a party to contest the validity of one or more of the codicils, without necessarily contesting the validity of the whole of the will. And the same rule applies to cases where no executor is appointed, but where the residuary legatee, or some other person, is applying for a grant of administration with the will annexed.

In cases of intestacy, the court has the power, formerly Adminis-
trations. vested in the ecclesiastical courts, of granting administration to the widow or next-of-kin of the deceased, or to both; having in this case an absolute discretion,

(*a*) 21 & 22 Vict. c. 95, s. 16, and 20 & 21 Vict. c. 77, s. 79.

which, however, is usually exercised in favour of the widow. In the case of the death of a married woman, her husband is entitled to the administration of her effects, unless she has duly made a will by virtue of a power or otherwise during the coverture, which the husband is not in a position to dispute, and provided she was not protected by an order under the Divorce Act, or by a decree for a judicial separation, or by a divorce *a mensa et thoro*; in either of which events her next-of-kin would be entitled to take out administration in preference to the husband. If the intestate leaves no wife, administration is granted to the next-of-kin, according to their degree, or to the persons entitled in distribution, or, in default of any such persons taking out administration, then to a creditor.

Common
form business.

The business of the court is divided into the common form business and contentious business: the common form business, including the granting of probates and administrations, where there is no contention as to the right thereto or when the right having been contested has been determined, and the contentious business relating to such matters as come into litigation. The common form business, which is usually brought before the court by motion and affidavit, in relation to the granting of probates, disposes of such questions as how much of a man's testamentary papers are entitled to probate,—as to whether, upon an admitted state of facts, the execution is of such a nature as to be in conformity with the requirements of the Wills Act,—as to whether obliterations, alterations, interlineations, or erasures appearing upon the face of a will are entitled to probate—in reference to contingent or conditional wills, as to whether or not the contingency or the condition referred to in the will has happened,—with a view to the proof of the contents of a lost will, whether the will was lost under such circumstances as to give rise to the presumption that it was revoked,—as to whether or not

Probate.

the will of a married woman, made during coverture, is entitled to probate,—and, of many other points too numerous to specify, upon which questions of law or practice may arise for the determination of the court. With regard, also, to the testamentary papers of the deceased, a question very often arises as to the incorporation of documents, and this happens in cases where a man in making his will refers to some other document then in existence, and directs his property to be distributed, either wholly or partially, according to the terms of that document. This mostly happens in cases where a testator refers to his marriage settlements, or to former wills, or lists of plate or valuables which he wishes to be distributed in a particular way when the instrument or document so referred to becomes part of the will; but the reference in the will to incorporate such paper with it must be clear and distinct, so as to preclude the possibility of any mistake in the identity of the paper; and the paper itself must be one already in existence, though it need not be in the possession or even under the control of the deceased.

Incorporation of documents.

With regard to obliterations, alterations, interlineations, and erasures, a will may be entitled to probate with or without them, according to whether or not they existed on the will at the time of the execution; and the presumption of law, in the event of there being no evidence one way or the other, will be that the will at the time of its execution by the testator did not contain such obliterations, alterations, interlineations, or erasures.

Obliterations, &c.

With regard to the will of a married woman, such will may be made by virtue of a power reserved to her, or of a marriage settlement, or with her husband's assent, or it may be made by her to carry her separate estate; and the court, in determining whether or not such will is entitled to probate, will not go minutely into the question, but will only require to be satisfied that the testatrix had a power reserved to her, or was

Wills of married women.

entitled to separate estate, and will, if so satisfied, grant probate to her executor, leaving it to the court of chancery, as the court of construction, to say what portion of her estate, if any, will pass under such will. In this case the husband, though he may not be entitled to take probate of his wife's will, may administer to such of her effects as do not pass under the will.

Probate in
fac simile.

In cases, also, where a question arises on the construction of a will, and where the actual appearance of the paper may be supposed to be of assistance to the court of construction, as, for instance, where a question arises whether a person has signed a paper under such circumstances as to lose his legacy as a legatee, the court will sometimes grant probate in *fac simile*.

Wills of
British sub-
jects made
abroad.

The 24 & 25 Vict. c. 144, contains a very important enactment with regard to the wills of British subjects made out of the United Kingdom. It is declared by that act, "that every will and other testamentary instrument made out of the United Kingdom by a British subject, whatever may be the domicile of such person at the time of making the same, or at the time of his or her death, shall, as regards personal estate, be held to be well executed for the purpose of being admitted in England to probate, and in Scotland to confirmation, if the same be made according to the form required either by the law of the place where the same was made, or by the law of the place where such person was domiciled when the same was made, or by the law then in force in that part of her Majesty's dominions where he had his domicile of origin" (*b*); and no will, or other testamentary instrument, will be held to be revoked, or to have become invalid, nor will the construction thereof be altered by reason of any subsequent change of domicile of the person making the same (*c*).

Adminis-
tration.

Non-contentious business relating to administrations consists in granting administrations in the ordinary way to

(*b*) Sect. 1.

(*c*) Sect. 3.

the widow or next of kin of the deceased, on their giving the usual administration bond, and of granting certain special administrations to meet the requirements of different cases. As, for instance, administration *ad colligenda bona* is granted in cases where there is some pressing urgency for getting in the estate of the testator, and where damage to the estate would accrue by waiting the usual time for obtaining a grant of administration; but this is a grant which is only made under very special circumstances, and without any peculiar regard to the interest of the party who applies for it. Also grants *de bonis non administratis*, where an executor or administrator dies leaving part of the deceased's goods unadministered, and this is usually made to those persons who would have been entitled to the administration in the first instance. Also administration *durante minore etate*, when the person appointed executor, or entitled to administration, is a minor, and it is necessary to appoint an administrator to act till he attains his majority; administration *durante absentia*, limited to the absence from the country of the person appointed executor; administration *cum testamento annexo*, when a deceased has made a will, but not appointed an executor, or where the appointment fails; also administration *pendente lite*, and other limited and special administrations fitted to meet the requirements of particular cases.

The court has also very full powers under the 73rd section of The Court of Probate Act, 1857, where a person has died intestate, or leaving a will, but no executor willing to take probate, or where the executor is out of the United Kingdom, and it appears to the court to be necessary or convenient by reason of the insolvency of the estate of the deceased, or other special circumstances, to appoint some person to be administrator other than the person who would otherwise have been entitled to the grant to appoint any person it shall think fit, upon his giving such security as the court shall direct. This is a

provision which was introduced for the first time by the legislature in the Court of Probate Act, 1857, and has been found to be attended with the greatest possible convenience in the administration of the property of deceased persons.

Presump-
tion of
death.

The court also makes grants of probate or of administration in cases where there is no direct evidence of the death of the party whose estate it is sought to administer. As, for instance, when a man has sailed on a voyage, and nothing has since been heard of the ship or crew, or after an unexplained absence for seven years, the court acting on the principles of the common law will presume him to be dead, and permit the executor or administrator to swear that he died on or after the day upon which he was last heard of. Also, in the case of two or more persons dying at the same time, when it is impossible to prove which survived the other, *e. g.*, a husband and wife dying in a shipwreck or a massacre, the court will grant administration to the husband as a widower, allowing the administrator to swear that there was no reason to believe that the wife survived her husband.

Contentious
business.—
Probate.

The business of proving a will or codicil is commenced by the entry of a caveat, or by the issuing of a citation, and the defendant having appeared to the citation, or in answer to the warning of the caveat, the contentious proceedings are said to have commenced. The first step in these proceedings is for each party to file his affidavit of scripts, and bring into court all the testamentary papers of the deceased in his custody, or under his control, and at the same time to make affidavit that no other testamentary papers of the deceased have come to his hands, possession, or knowledge, before or since the death of the testator. If there are any testamentary papers in the hands of persons not parties to the suit, which it is necessary or desirable to have brought into court, the judge has power to issue a subpoena to such third persons commanding them to bring such

papers into the registry, and in the event of their non-compliance with the terms of such subpoena, to enforce their obedience by attachment. The scripts having been filed, the party propounding the will files his declaration, to which the other party pleads, and issue is joined. This having been done, the court directs the trial either before itself alone, or by a special or common jury, or where the property, if real estate, is situate in the country, or where the expense of bringing the witnesses up to town would be considerable, then before a judge of assize; and where the personalty is under 200*l.*, and the realty under 300*l.*, the suit may be determined in the county court. The court has also power to grant a discovery of documents, to issue orders and commissions for the examination of witnesses, and to make such other orders in reference to the trial of its suits as are made by the courts of common law and equity.

The questions for determination in a probate suit, independent of the question of the right of the party to contest the validity of the will, resolve themselves usually into questions of the execution of the will according to the requirements of the Wills Act, of the testamentary capacity of the deceased, and of his knowledge and approval of the contents of his will, affirmative proof of which issues lies upon the party propounding the will. Also whether the will has been wholly or in part obtained by undue influence, or by fraud, or whether the will has been wholly or in part revoked by the testator, affirmative proof of which issues lies upon the party opposing the will, and these issues are tried by the same rules of evidence as are observed in the courts of common law. The heir-at-law, when the will affects the real estate, having been made a party to the proceedings, is entitled, if he thinks fit, to appear and plead, and take part in the proceedings; and similarly the next of kin, and persons who have obtained leave to intervene in the suit, as interested under former wills or otherwise, may, subject to

any order of the court as to costs, also appear and take part in the proceedings, their actual share in the trial of the issues joined in the suit being regulated by the discretion of the presiding judge.

Costs. The different issues in the suit having been disposed of, the court pronounces either for or against the will, and exercises its discretion as to the condemnation of the several parties in the costs of the suit. The next of kin, however, of a deceased, are entitled upon giving notice that they merely insist on the will being proved in solemn form of law, and only intend to cross-examine the witnesses produced in support of the will, to put the executor upon such proof of the will, without the liability of being themselves condemned in costs.

Appeal. The court has power to grant new trials of jury causes and rehearing of non-jury causes, and any party dissatisfied with the judgment of the court may appeal to the house of lords as of right from a final decree, and by leave of the judge from interlocutory decrees or orders.

Administration. Where the right to administration is contested in an interest suit, the parties propound their different interests by declaration and plea, and their right is determined by the court as in a probate suit; but where there is no dispute as to the relationship or the interest of the party, and where the only question is to which of several applicants the administration is to be granted, the practice usually is for one party to file what is termed an act on petition, to which the other party files an answer, the averments of which are supported by affidavit, and the matter is disposed of by the judge on the consideration of such petition and answer and affidavits.

As an incident to the trial of both probate and administration suits, the judge has power to appoint an administrator *pendente lite* to deal with the personalty, and a receiver to deal with the real estate, and has the same power to enforce its various decrees and orders as is now possessed by the court of chancery.

Where, however, a question of legitimacy or of pedigree is to be determined, then the process usually is for the party to declare as next-of-kin, and set out his pedigree, and the case is tried in a somewhat similar manner to an action of ejectment, where the heir-at-law has to make out his title to the estate. Questions of interest also frequently arise as incidents to a suit for the obtaining or revoking of probate, because every person appearing to oppose the executor, or other person who is seeking probate of a will or administration with a will annexed, has to set out in his appearance the character in which he appears, and the interest which he affects to take in the estate of the testator; and it is competent to such executor or other person to dispute his right to appear in such capacity, and call upon him to state in a declaration the actual interest which he so takes. This declaration is then pleaded to, and the proceedings take the form of an interest suit.

CHAPTER XVI.

THE HIGH COURT OF ADMIRALTY.

Jurisdic-
tion.

THE high court of admiralty is a court of very great antiquity, tracing back at least as far as the time of Edward III., and it formerly entertained not only civil suits, but it also had an extensive criminal jurisdiction. The latter, however, so far as it relates to crimes committed at sea, is now exercised by the commissioners of the central criminal court, or by judges of assize, as the circumstances may require; and the civil jurisdiction has of late years been greatly modified and extended so as to bring it more into accordance with the requirements of the times. It exercises a jurisdiction equitable as well as legal, and has a similar power of enforcing its decrees and orders to that possessed by courts of common law. It has, also, power to make and issue such rules, and give such directions for the trial of suits, as may from time to time be necessary for that purpose. By the 24 Vict. c. 10, the high court of admiralty is constituted a court of record for all intents and purposes, and has power to proceed either *in rem* or *in personam*: *in personam* by calling upon the masters or owners of vessels to show cause why they should not appear and defend the suits instituted against them; and *in rem* by arrest of the ship itself, which is only released upon bail being given to the full amount of the claim and costs likely to be incurred in the suit. The court formerly, also, under certain circumstances, proceeded by arrest of the person of the defendant. This process, however, seems of late years to have fallen

into disuse. The Admiralty Court Act of 1861 (24 Vict. c. 10) has considerably extended and improved the procedure and practice of the court, and by virtue of that act, and also by the original jurisdiction possessed by the court, it can now try nearly all maritime questions which arise in reference to British and foreign ships.

The suits usually entertained by the court are for the purpose of enforcing bottomry or respondentia bonds; to obtain salvage awards; to enforce the payment of money due for necessities supplied to a ship, or for wages due to the master or crew, or for towage or pilotage services; to recover damages in cases of collision, and of damage done by any ship; also in cases of damage to goods, or in respect of breaches of contract, where the owners of the vessel are domiciled abroad. The court also entertains questions of prize and booty of war, but it exercises this jurisdiction by virtue of a warrant issued for that purpose, giving it special jurisdiction in that behalf.

With regard to respondentia and bottomry bonds, the master of a ship has a right to give one or more bonds, in the nature of mortgages, upon his ship for such amount as may be necessary to enable the vessel to proceed on its journey and to complete its voyage. These bonds constitute a liability, which attaches to the ship, notwithstanding it may be sold by the owner and the money received by him without any notice to the purchaser of such bond. The same rule applies to the case of a respondentia bond; the difference between that and a bottomry being, that whilst in bottomry the master pledges the ship and freight as well as the cargo, in respondentia the cargo alone is pledged. In enforcing these bonds the last is given precedence over those previously executed; and the court takes into consideration the circumstances under which the loan was effected, and, provided the bond itself is of such a nature as to lead it to believe that there has been no fraud in its inception, and that it represents a *bond fide* transaction, enforces the bond,

Respondentia and bottomry bonds.

notwithstanding the usual formalities of a bond of that nature have not been complied with.

Salvage.

The 3 & 4 Vict. c. 65, s. 6, gives the court jurisdiction to decide all claims and demands whatsoever in the nature of salvage for services rendered to or damage received by any ship or sea-going vessel, or in the nature of towage. Salvage claims are usually enforced in the first instance by an arrest of the vessel, if the vessel can be arrested by the salvors who make the claim; and the court, in making its award, considers whether the salvage has had reference to the preservation of life, or of the ship, or of the cargo, and makes such award as it thinks proper, acting upon the principle, that the preservation of life is entitled to a higher reward than the salvage of ship or cargo.

**Towage and
necessaries.**

The same section gives the court power to decide and enforce claims in the nature of towage, or for necessities supplied to any foreign ship or sea-going vessel. This provision is extended by the 5th section of the Admiralty Court Act, 1861, by which it is declared, that the Court of Admiralty shall have jurisdiction over any claims for necessities supplied to any ship elsewhere than in the port to which the ship belongs, unless it is shown to the satisfaction of the court that at the time of the institution of the cause any owner or part owner of the ship is domiciled in England or Wales, provided, however, that unless the plaintiff recover 20*l.* he will not be entitled to any costs, unless the judge certifies that the case is a fit one to be tried in that court. The court has, also, by the 4th section of the same act, jurisdiction over any claim for the building, equipping, or repairing of any ship, if at the time of the institution of the cause the ship or the proceeds are under arrest of the court.

**Equipment
and repairs.**

**Damage
done by any
ship.**

The 7th section of the act gives the court jurisdiction over any claim for damage done by any ship, thus conferring upon it the most extensive power in collision and similar cases. And so liberally has this power been construed that it has been held to give the court jurisdiction

to award compensation to a diver who had been injured by the paddle of a steamer passing over him (*a*), and to extend to the case of a collision between two foreign vessels in foreign waters (*b*).

It also, under the 6th section of the act, has jurisdiction over any claim by the owner, or consignee, or assignee of any bill of lading of any goods carried into any port in England or Wales in any ship, for damage done to the goods, or any part thereof, by the negligence or misconduct of, or for any breach of duty or breach of contract on the part of the master or crew of the ship, unless it is shown to the satisfaction of the court at the time of the institution of the cause that any owner or part owner of the ship is domiciled in England or Wales. It has, also, jurisdiction under the 8th section of the act to decide all questions arising between the co-owners, or any of them, touching the ownership, possession, or employment, or earnings of any ship registered at any port in England or Wales, or any share thereof, and it may settle all accounts outstanding and unsettled between the parties in relation thereto, and may direct the ship, or any share thereof, to be sold, and may make such order in relation to the matter in dispute as it shall think fit.

Damage to
goods or
breach of
contract.

Questions
between
owners.

It also has jurisdiction by the 11th section over claims by way of mortgage, whether the ship, or the proceeds thereof, be under arrest of the court or not.

Mortgages.

It also, by the 10th section, entertains claims for wages earned on board a ship, whether by virtue of a special contract or otherwise, and also claims for wages or disbursements by the master of a ship, provided always that unless the plaintiff recover 50*l.* he does not get his costs, unless the judge grant a certificate to entitle him to them.

Wages.

It also has an original jurisdiction to enforce claims for pilotage, and may issue orders in suits of restraint to prevent the sale of the whole or any part of the ship ;

Pilotage.

Restraint.

(*a*) The Sylph, 2 L. R. Ad. & Ecc. 24. (*b*) The Courier, 1 Lush. 541.

and it may, by its order, remove the master of a ship where his removal appears to be necessary.

County
courts.

The powers exercised by the high court of admiralty have recently, by the 31 & 32 Vict. c. 71, been conferred on certain county courts, by virtue of which they are entitled to try claims for salvage where the property saved does not exceed 1000*l.*, or where the amount claimed does not exceed 300*l.*; claims for towage, necessities, or wages where the amount claimed does not exceed 150*l.*; claims for damage to cargo, or for damage by collision where the amount claimed does not exceed 300*l.* They have also jurisdiction (by the 32 & 33 Vict. c. 51) to try and determine any claim arising out of any agreement made in relation to the hire of any ship or in relation to the carriage of goods in any ship, and also as to any claim in tort in respect of goods carried in any ship, provided the amount claimed does not exceed 300*l.* This proviso, however, does not prevent the parties from trying all such suits in the county court, although the claim exceeds the amount above limited, if they agree in writing that such county court (being a county court having admiralty jurisdiction) shall have jurisdiction to try the case.

The judge of the county court may also (by section 5 of the last-mentioned act), at the request of either party, be assisted by two mercantile assessors.

Appeal from
county
courts.

An appeal from any final decree, or order of the county court, in an admiralty case, or by permission of the judge of the county court, from any interlocutory decree or order therein, lies to the high court of admiralty, subject to security for costs being given. No appeal, however, lies from any decree or order of the high court of admiralty made on appeal from the county court, except by the express permission of the judge of the high court of admiralty, and no appeal lies unless the amount decreed or ordered to be due exceeds the sum of 50*l.*

Practice

The practice of the Court of Admiralty is regulated by

the rules and orders of November, 1859, by virtue of which parties are entitled to prove their case, subject to their complying with the necessary formalities, either by affidavit, by written depositions, or by the oral examination of witnesses in open court, or partly by one mode and partly by another. In all cases, however, where the oral examination of witnesses can be had, it is the practice of the court to incline towards that mode of taking the evidence.

The court, at the hearing of the cause, has power to summon to its assistance Trinity Masters to sit as assessors, and it usually does so in cases requiring for their determination any peculiar knowledge of nautical science. Thus in cases of collision it is almost a matter of course for the court to require the presence of the Trinity Masters upon application from either party for that purpose; and there is power under the Admiralty Court Act, 1861 (section 8), for the court to make an order for the Trinity Masters to inspect any ship, or other property, the inspection of which may be material to the issue in the cause.

The appeal from the high court of admiralty is to the Appeal. Judicial Committee of the Privy Council. It lies, as of course, from any final decree or sentence of the court; but from any interlocutory decree or order, it lies only by permission of the judge.

CHAPTER XVII.

ECCLESIASTICAL COURTS, ETC.

Jurisdic-
tion.

THESE courts formerly exercised a very extended jurisdiction, comprising within their scope the determination of all testamentary causes and suits, and the granting of probates and letters of administration. They also entertained matrimonial suits, and had power to decree a divorce *a mensâ et thoro*, and to give the relief, now granted by the court of divorce, except, as has been before stated, the dissolution of the marriage tie. Their powers, however, of late years have been very considerably restricted. Thus, their jurisdiction over all matters and causes testamentary, including suits for legacies, or for the distribution of residues, was taken from them by the 20 & 21 Vict. c. 77, and conferred upon the court of probate. Their jurisdiction in matrimonial matters and suits was taken from them by the 20 & 21 Vict. c. 85, and conferred upon the court for divorce and matrimonial causes. Their jurisdiction in the matter of church rates, which was formerly a most fruitful source of litigation, has been abolished by the 31 & 32 Vict. c. 109, which declares that, after the passing of that act, "no suit shall be instituted, or proceeding taken, in any ecclesiastical or other court, to compel the payment of any church rate made in any parish or place in England or Wales." Their jurisdiction, also, in cases of brawling, except as between persons in holy orders, has been taken away by the 23 & 24 Vict. c. 32, which has given power to justices of the peace to fine or imprison persons found guilty of

unlawfully interfering with any clergyman in holy orders during the service, or of making disturbances in churches or chapels, churchyards or burial grounds. And the jurisdiction to entertain suits for defamation was abolished by the 18 & 19 Vict. c. 41. During the last session of parliament, also, a bill was introduced for the purpose of further altering their jurisdiction, and re-moulding their procedure; and although such bill failed to become law, it is extremely probable that some considerable alterations will shortly be made both in their jurisdiction and in their procedure. In the view of such probable legislation, therefore, it is hardly necessary to do more than allude cursorily to the powers and the ordinary process of these courts.

The business of the ecclesiastical courts, of which the principal are the consistory courts of the bishop of each diocese, and the court of arches, which sits at Westminster, is now mainly confined to inquiring into charges of heresy, of improperly conducting the service of the church, and of immoral or scandalous conduct on the part of clergymen. These suits, which are of a criminal nature, are preceded by an inquiry under a commission issued by the bishop of the diocese in which the offence is alleged to have been committed, and a consequent report of the commissioners to the effect that there are sufficient *prima facie* grounds for instituting further proceedings. The charges are usually for neglect of duty as a clergyman, or violation of the duties of the sacred office, for scandalous or immoral conduct, for brawling in a church or churchyard, for simony, or for maintaining doctrines, or performing divine service in a manner contrary to the articles of religion as by law established.

These courts have also jurisdiction to entertain suits of a quasi criminal nature against laymen, for gross immorality, for damaging the church or the churchyard, or not repairing the chancel or aisle when it is incumbent on them to do so: also against churchwardens for neglect of

Suits
against
clergymen ;

Against
laymen.

duty in respect of the fabric of the church, or the providing of the necessary robes or elements for the clergy : and against any person for defacing or removing the monuments or the pews, or otherwise improperly interfering with the church or churchyard without a faculty previously granted by the ordinary.

Civil suits ;
perturbation of
seat ;

They also entertain certain suits of a civil nature, as, for instance, a suit known as a suit for perturbation of seat, where a party claims to be entitled to a certain pew or seat in a church from which he has been excluded ; and which may be brought either against the churchwardens, to secure the claimant's quiet enjoyment of his seat, or against the actual intruder, to compel him to prove his title or to cease his intrusion for the future. In respect of this right, however, an action for trespass will also lie at common law against the intruder, where the plaintiff can show by prescription a right to the seat or the pew which he claims.

for grant
of a faculty.

When, also, it is desired to make such alterations in a church or churchyard as require to be authorised by a faculty (or permission) from the ordinary, the ordinary, before granting such faculty, causes all persons having an interest in opposing the grant to be cited to show cause why such grant should not issue, and in the event of any persons appearing to show cause against the issuing of the grant, a suit becomes instituted, and the parties are heard, their various objections are considered, and judgment is given, as in an ordinary suit.

Procedure.

The procedure of these courts is usually by citation, libel or articles, and answer. Formerly the evidence was taken upon depositions by examiners ; now, however, by the 17 & 18 Vict. c. 47, the ecclesiastical courts are empowered to take evidence *viva voce*, and this is the course usually pursued.

The court of
arches.

The court of arches, above referred to, is the court of appeal from the different diocesan courts in the province of Canterbury, and is presided over by a judge, called the

Dean of Arches, who sits as deputy to the archbishop, and is supposed to have received that title from originally holding his court in the church of St. Mary-le-Bow (*a*). It, also, to a certain extent, is a court of original jurisdiction, as it habitually takes cognizance of all such suits as the several bishops or inferior tribunals in the province may submit to its determination by letters of request.

A final appeal from the decision of the court of arches Appeal. lies to the judicial committee of the privy council.

A jurisdiction somewhat analagous to that exercised over clergymen by the ecclesiastical courts is exercised over soldiers by courts martial. Courts martial. These courts, which exist solely for the trial of military offences committed by persons in the army or navy, regulate their proceedings according to the articles of war and the provisions of the Mutiny Act, which is re-enacted, with but slight modifications, in each session of parliament. They are empowered to take evidence upon oath, and to inflict the necessary punishments for such offences, including judgment of death. Their procedure has, however, of late years been the subject of much comment, and it is probable that before long it will be subjected to considerable revision. So long, however, as courts martial act within their jurisdiction, taking cognizance only of such offences as are contrary to the articles of war, and inflicting such punishments as they are competent to inflict, the courts of common law will not interpose, either to question the propriety of their sentences, or to investigate the grounds upon which they arrive at their decisions.

(*a*) Sancta Maria de Arcubus.

CHAPTER XVIII.

THE COUNTY COURT, AND SOME OTHER COURTS OF LIMITED JURISDICTION.

THE county court is a local tribunal, originally instituted by the stat. 9 & 10 Vict. c. 95, held at prescribed periods in the district assigned to it, and presided over by a single judge or his duly appointed deputy. So much of the business of this tribunal as is routine, or other than judicial, being principally performed by the registrar.

Jurisdiction
of county
court
generally.

The county court has had conferred upon it by many statutes separate branches of jurisdiction, so that it administers not merely the common law, but likewise equity (*a*) and bankruptcy (*b*), and discharges duties in regard to probate and administration (*c*), as a court of admiralty (*d*), and otherwise. We shall here, however, treat only of the two most important branches of county court jurisdiction, viz., that which it originally possessed under the 9 & 10 Vict. c. 95, as extended by subsequent statutes (*e*), and that which was given to it by the 28 & 29 Vict. c. 99, amended by the 30 & 31 Vict. c. 142.

As introductory to our remarks upon the actual jurisdiction of the county court, we may observe that no action

(*a*) 28 & 29 Vict. c. 99; 30 & 31 Vict. c. 142, ss. 8, 9, 24-27.

(*b*) See particularly 32 & 33 Vict. c. 71, which comes into operation on January 1, 1870.

(*c*) 20 & 21 Vict. c. 77; 21 & 22 Vict. c. 95.

(*d*) 31 & 32 Vict. c. 71; 32 & 33 Vict. c. 51.

(*e*) 9 & 10 Vict. c. 95, s. 58; 13 & 14 Vict. c. 61, s. 1; 19 & 20 Vict. c. 108, ss. 23, 24; 30 & 31 Vict. c. 142.

which can be brought therein, is now maintainable in an inferior court not of record (*f*); and if an action be brought in any other than a superior court of law which could have been brought in a county court, and the verdict recovered be for less than 10*l.*, the plaintiff will not be entitled to recover from the defendant a greater amount of costs than he would have been allowed if the action had been brought in the county court, unless the judge certify that it was fit to be brought elsewhere (*g*). With respect also to any action which may be brought in a superior court of common law, both parties may agree, by a memorandum duly signed, that a county court named therein shall have power to try such action, and thus give it jurisdiction so to do (*h*). But where an action is commenced in a superior which might have been brought in the county court, the consequence will either be its compulsory removal into such latter court, or loss of costs by the plaintiff (*i*). And further, if an action be brought in a county court which that court has no jurisdiction to try, the judge will order the cause to be struck out, unless the parties consent to the court having jurisdiction to try the same (*k*). By the provisions here referred to (*l*) has the legislature especially endeavoured to induce litigants to resort to local courts, recently established for the adjustment of limited demands,—to deter them, on the one hand, from harassing our judges, whose attention is occupied with matters of greater moment; on the other hand, from appealing for justice to courts incompetent properly to administer it, antiquated or obsolete.

The county court has, at present, jurisdiction to enter- Contract
tain any action of contract, where the “debt, damage, or demand,” does not exceed the sum of 50*l.*, whether “on balance of account or otherwise,” or “after an admitted

(*f*) 30 & 31 Vict. c. 142, s. 28.

(*h*) 30 & 31 Vict. c. 142, s. 14.

(*g*) *Id.* s. 29.

(*l*) See, also, 15 & 16 Vict. c. 54,

(*k*) 19 & 20 Vict. c. 108, s. 23.

s. 7, cited *post*.

(*i*) *Post*, pp. 446, 449.

set-off" (*m*). This court may accordingly take cognizance of an action upon a bill of exchange, or for the recovery of goods *in specie* within the value of 50*l.*; though not of an action upon a judgment recovered in a superior court (*n*); nor where the claim is for beer consumed on the premises where sold or supplied, or money lent for obtaining the same (*o*).

A plaintiff cannot, however, divide any cause of action, for the purpose of bringing two or more suits in a county court (*p*); but, though claiming "a debt, damage, or demand" for more than 50*l.*, he may, if so minded, "abandon the excess," and recover there to an amount not exceeding the 50*l.* (*q*).

The consequence, as regards costs, of suing for breach of contract in a superior court, where the claim might have been heard in the county court, will be presently noticed; we may, however, here observe, that where in an action of contract brought in a superior court, "the claim indorsed on the writ does not exceed 50*l.*, or where such claim, though it originally exceeded 50*l.*, is reduced by payment, an admitted set-off, or otherwise to a sum not exceeding 50*l.*," it is competent to the defendant, if he contest the whole or part of the plaintiff's demand, to call upon him by summons to show cause before a judge at chambers why such action should not be tried in the county court, or one of the county courts in which it might have been commenced, and the judge will, unless there be good cause to the contrary, order that the action be there tried accordingly (*r*). Also, where in an action of contract brought in a superior court "the claim indorsed on the writ does not exceed 50*l.*, or where such claim, though

(*m*) 9 & 10 Vict. c. 95, s. 58;
13 & 14 Vict. c. 61, s. 1; 19 & 20
Vict. c. 108, s. 24.

(*n*) 19 & 20 Vict. c. 108, s. 27.

(*o*) 30 & 31 Vict. c. 142, s. 4.

(*p*) 9 & 10 Vict. c. 95, s. 63;

13 & 14 Vict. c. 61, s. 1. *Grimbly*
v. Aykroyd, 1 Exch. 479; judg-
ment in *Wood v. Perry*, 3 Exch.

445.

(*q*) *Ib.*

(*r*) 30 & 31 Vict. c. 142, s. 7.

it originally exceeded 50*l.*, is reduced by payment into court, payment, an admitted set-off, or otherwise to a sum not exceeding 50*l.*," it is enacted by 19 & 20 Vict. c. 108, s. 26, that a "judge of a superior court, on the application of either party after issue joined, may in his discretion, and on such terms as he shall think fit, order that the cause be tried in any county court which he shall name," and the trial will take place there accordingly (*s*).

Although the county court, as originally constituted, ^{Tort.} had a jurisdiction limited in amount over "all pleas of personal actions," and consequently in tort as well as in contract, the following cases were nevertheless till recently wholly, or save by consent of parties (*t*), excluded from the jurisdiction of the court (*x*), viz., any action of ejectment; or in which the title to a corporeal or incorporeal hereditament, or to any toll, fair, market, or franchise might be in question; any action in which the validity of a devise, bequest, or limitation under a will or settlement might be disputed (*y*); any action for a malicious prosecution, or for libel, slander, seduction, or breach of promise of marriage. A great extension of jurisdiction has, however, been recently given to the county court in respect of some of the matters above enumerated. For an action of ejectment (*z*) now lies there, where neither the value of the lands, tenements, or hereditaments claimed, nor the rent payable in respect thereof exceeds the sum of 20*l.* yearly (*a*). The county court has now jurisdiction to try an action in which the title to any corporeal or incorporeal hereditament may come in question, where neither the value of the land, tenement, or hereditament in dispute, nor the rent payable in respect thereof, exceeds the sum

(*s*) See also 19 & 20 Vict. c. 108, s. 39.

(*t*) *Ante*, p. 445.

(*x*) 9 & 10 Vict. c. 95, s. 58;
19 & 20 Vict. c. 108, s. 23.

(*y*) The county court judge has

jurisdiction, however, in regard to a claim for "any legacy under a will." 9 & 10 Vict. c. 95, s. 65;
post, pp. 450, 461.

(*z*) *Ante*, p. 273.

(*a*) 39 & 31 Vict. c. 142, s. 11.

of 20*l.* by the year, or in case of an easement or licence where neither the value nor reserved rent of the land, tenement, or hereditament in respect of which the easement or licence is claimed, or on, through, over, or under which such easement or licence is claimed, exceeds such sum yearly: "Provided that the defendant in any such action of ejectment, or his landlord, may, within one month from the day of service of the writ, apply to a judge at chambers for a summons to the plaintiff to show cause why such action should not be tried in one of the superior courts on the ground that the title to lands or hereditaments of greater annual value than 20*l.* would be affected by the decision in such action:" and on the hearing of such summons the judge, if satisfied that the title to other lands would be so affected, may order such action to be tried in a superior court, and, thereupon, proceedings in such action in the county court will be discontinued (*b*). Moreover, any person against whom "an action for malicious prosecution, illegal arrest, illegal distress, assault, false imprisonment, libel, slander, seduction, or other action of tort" is brought in a superior court, may now make affidavit that the plaintiff has no visible means of paying the costs of the defendant should a verdict be not found for the plaintiff, and thereupon a judge of the court in which the action is brought may order that—unless the plaintiff shall, within a time to be therein mentioned, give full security for the defendant's costs to the satisfaction of one of the masters of the said court, or satisfy the judge that he has a cause of action fit to be prosecuted in the superior court—all proceedings in the action shall be stayed; or in the event of the plaintiff being unable or unwilling to give such security, or failing to satisfy the judge as aforesaid, the judge of the superior

(*b*) 30 & 31 Vict. c. 142, s. 12.
Prior to this enactment, however,
the county court had jurisdiction in

a case of distress for rent, although
the title to the premises was dis-
puted.

court may order that the cause be remitted for trial before a county court to be therein named, which will have like powers and jurisdiction with respect to the cause as if both parties had agreed, by memorandum (*c*), that it should have power to try the said action, and the same had been commenced therein.

We may add, that by stat. 19 & 20 Vict. c. 108, s. 25, where in any action in the county court "the title to any corporeal or incorporeal hereditament, or to any toll, fair, market, or franchise, shall incidentally come in question," the judge will have jurisdiction to decide the claim which it is the immediate object of the action to enforce, if both parties at the hearing consent, in writing, to the judge having such power; but the judgment of the court will not be evidence of title between the parties or their privies in any other action in that court, or in any proceeding in any other court; and such consent will not affect any right of appeal of either of the parties to the first-mentioned action.

Thus have the restrictions formerly imposed upon the jurisdiction of the county court in actions of tort been, under the provisions of the 30 & 31 Vict. c. 142, considerably relaxed, and we need only further observe as to this part of our subject that the jurisdiction of the local court has, by the Common Law Procedure Act, 1860, section 22, been extended to all cases of replevin (*d*), and is no longer confined, as it formerly was, by certain provisions of the statute 19 & 20 Vict. c. 108 (*e*), to the cases of goods distrained for rent or damage feasant.

The consequence of suing in a superior court for a debt, damage, or demand, recoverable in the county court may be serious; for should the plaintiff recover a sum not exceeding 20*l.* if the action is founded on contract, or 10*l.* if in tort, whether by verdict, judgment by default, on demurrer, or otherwise, he will not be entitled to any

(*c*) *Ante*, p. 445.

seq.

(*d*) As to which, *ante*, pp. 259 *et*

(*e*) Sects. 13 *et seq.*

costs of suit unless the judge certify that there was sufficient reason for suing in a superior court, or unless the court or a judge at chambers allow the costs (*f*).

Recovery
of small
tenements.

Besides the matters already noticed, any demand not exceeding in amount 50*l.*, in respect of "the whole or part of the unliquidated balance of a partnership account," or "of a distributive share" of personal estate "under an intestacy," or "of any legacy under a will," is within the cognisance of the county court (*g*). This court is also in some cases invested with power to afford redress of an extraordinary kind, as on interpleader (*h*). And summary proceedings for enabling a landlord to recover possession of small tenements from a tenant, who holds over after the determination of his term, may be taken either before justices of the peace, under the 1 & 2 Vict. c. 74, or before the judge of a county court under the 19 & 20 Vict. c. 108 (*i*). The former of these statutes applies where the premises are held at will, or for any term not exceeding seven years; and the tenant is liable either to pay no rent or a rent under 20*l.* a-year, and upon which no fine has been reserved or made payable (*k*). Proceedings under the county court statute are available where the ordinary relation of landlord and tenant exists, and are restricted to tenancies "where neither the value of the premises, nor the rent payable in respect thereof," exceeds the sum of 50*l.* per annum. If the term of tenancy of such premises has expired or been duly determined by notice, but the tenant persists in holding over, then upon the necessary proofs being adduced before the judge, he may order possession to be given to the landlord; and if such order be not obeyed, the registrar of the court may issue a warrant for possession (*l*). An appeal however lies in this case from

(*f*) 30 & 31 Vict. c. 142, s. 5.

Vict. c. 142, s. 31.

(*g*) 9 & 10 Vict. c. 95, s. 65; 13

(*i*) Sects. 50-56.

& 14 Vict. c. 61, s. 1.

(*k*) Sect. 1.

(*h*) See, for instance, 30 & 31

(*l*) 19 & 20 Vict. c. 108, ss. 50-56.

the county to a superior court, when the yearly rent or value of the premises exceeds 20*l.*, or by leave of the county court judge, where it is less (*m*) than that amount.

The practice of the county court is, at present, regulated by various statutes (*n*), and by rules made in pursuance of statutory powers (*o*). The general principles which govern the practice of the superior courts of common law (*p*) may also be applied at the discretion of the judges of the county courts to proceedings therein (*q*).

Ordinary
practice of
the county
court.

The suit in a county court is commenced (*r*) by plaint, which must be entered in the county court within the district of which the defendant or one of the defendants dwells or carries on his business at the time of bringing the action, or it may be entered, by leave of the judge or registrar, in the county court within the district of which the defendant or one of the defendants dwelt or carried on business, at any time within six calendar months next before the time of action brought, or, with the like leave, in the county court in the district of which the cause of action wholly or in part arose (*s*), unless, indeed, the plaintiff dwells or carries on his business, and the defendant likewise does so, within a metropolitan district, or in the city of London, in which case the plaint may be entered either in the plaintiff's or in the defendant's district (*t*).

(*m*) 30 & 31 Vict. c. 142, s. 13.

(*n*) 9 & 10 Vict. c. 95; 12 & 13 Vict. c. 101; 13 & 14 Vict. c. 61; 15 & 16 Vict. c. 54; 17 & 18 Vict. c. 16; 19 & 20 Vict. c. 108; 21 & 22 Vict. c. 74; 22 & 23 Vict. c. 57; 28 & 29 Vict. c. 99 (which gives an equitable jurisdiction); 29 & 30 Vict. c. 14; 30 & 31 Vict. c. 142.

There are many statutes which relate to the jurisdiction and practice of county courts in regard to particular matters, as to which see

Poll. & N. Pract. County Court, 6th ed., Table of Contents, pp. viii., ix.

(*o*) See the Rules, Orders, and Forms for regulating the Practice of the County Courts, A.D. 1867.

(*p*) *Ante*, chap. 12.

(*q*) See 9 & 10 Vict. c. 95, s. 73.

(*r*) 9 & 10 Vict. c. 95, s. 59.

(*s*) 30 & 31 Vict. c. 142, s. 1.

(*t*) 19 & 20 Vict. c. 108, s. 13; 30 & 31 Vict. c. 142, s. 3.

Upon entry of the plaint (*u*) a summons to appear is issued to the bailiff of the court (*x*), to be by him served on the defendant ten clear days at least before the holding of the court at which it is returnable (*y*). To the summons is annexed a copy of the plaintiff's particulars of demand, in any case where they are required (*z*).

There are no written pleadings in a suit in the county court; but if any one or more of certain defences are intended to be set up, notice thereof, unless the plaintiff consent to waive it, must be given to him. These defences are set-off, infancy, coverture, the statute of limitations, and discharge under any statute relating to bankrupts (*a*). Any other defence is available to the defendant at the trial, whether by traverse or confession and avoidance, without any formal joinder of issue. Interrogatories may now by leave be delivered by either party to the suit to his adversary (*b*), and an inspection and discovery of documents may be obtained (*c*).

When no jury has been impaneled, the judge himself determines matters as well of fact as of law; but a jury may be summoned on the requisition of either party to the suit, as matter of right, should the amount claimed exceed 5*l.*; and in any case where such amount does not exceed 5*l.*, the judge may, on the application of either party, order the action to be tried by a jury (*d*).

Assuming that both parties to the suit appear, the judge, either with or without a jury, as the case may be, proceeds to hear the cause. If the defendant appears and admits the claim, the registrar may, by leave of the judge, settle the terms and conditions upon which it is to be

(*u*) R. 37.

(*x*) R. 10.

(*y*) 9 & 10 Vict. c. 95, s. 59, and r. 51. As to the mode of service generally, see rules 52 *et seq.*

(*z*) See rules 43, 44.

(*a*) 9 & 10 Vict. c. 95, s. 76; and see rules 88-93.

(*b*) C. L. Proc. Act, 1854, ss. 51, 52, applied to county courts by order in Council, Nov. 18, 1867. Rules 80-82.

(*c*) C. L. Proc. Act, 1854, s. 50, applied as above to county courts. Rules 76-79.

(*d*) *Ib.* s. 70; rules 77, 104, 105.

paid, and may enter up judgment accordingly (*e*). And it is worthy of remark, that in any action brought in a county court for the price or value of goods or chattels which or some part of which were sold and delivered to the defendant to be dealt with in the way of his trade, profession, or calling (*f*), the plaintiff may, at his option, cause to be issued a summons in the ordinary form, or (upon filing an affidavit) in the form provided by statute (*g*), and if such last-mentioned summons be issued, it must be personally served on the defendant twelve clear days at least before the return day thereof, and then if the defendant do not, at least six clear days before such return day, give notice in writing, signed by himself, his attorney or agent, to the registrar of the court from which the summons issued, of his intention to defend, the plaintiff may, within two months after such return day, without giving any proof of his claim, have, upon proof by affidavit of the service of the summons, judgment entered up against the defendant for the amount of his claim and costs. The order upon such judgment will be for payment forthwith, or at such times, and by such instalments as the plaintiff has in writing consented to take at the time of entering the plaint. If, however, the defendant give such notice as above specified, the action will be heard in the ordinary course; and in any event the registrar will, immediately after the last day for giving such notice, inform the plaintiff by letter whether the defendant has or has not given notice of his intention to defend.

If the action brought in the county court be founded on contract, and the defendant does not appear at the hearing, either in person or by some one duly authorised on his behalf, and no sufficient excuse for the defendant's absence be shown, the registrar may, by leave of the judge, upon due proof of the service of the summons and of the debt being due and owing, enter up judgment for

(*e*) 30 & 31 Vict. c. 142, s. 17.

(*g*) *Ib.* Sched. (B).

(*f*) *Ib.* s. 2.

the plaintiff, and have the same power to make an order for payment by instalments, or to enter up judgment of nonsuit, or to strike out or adjourn the cause, as the judge of the court has; but the judgment so entered up, and any execution thereon, may be set aside, and a new trial granted, upon such terms, if any, as the judge may think fit to require (*h*).

Should neither counsel nor attorneys attend, at the hearing of a suit in the county court, the judge must endeavour to elicit from the parties and their witnesses (whose attendance is procured by summons (*i*)), such facts as will enable him to determine the question or questions in dispute. When the case is closed on both sides, the judge, if unassisted by a jury, decides both on fact and law; but, if assisted by a jury, he will direct them in point of law, whilst they decide upon the facts. Judgment is then given for the plaintiff or defendant—unless, indeed, the former be nonsuited—and entered on the minutes of the court. The judge also directs the mode of payment (which in certain cases may be by instalments), of any sum to which he may find the plaintiff entitled (*k*). The costs of the action abide the event, unless otherwise ordered by the judge, and execution may issue for them (*l*).

When the judgment has been entered up, it may be enforced by execution against the goods, leviable by writ of *fiery facias*; the wearing apparel and bedding of the judgment debtor or his family, and the tools and implements of his trade, to the value of 5*l.*, being, however, protected from seizure (*m*).

Execution against the person may be obtained on

(*h*) 30 & 31 Vict. c. 142, s. 16.

(*i*) 9 & 10 Vict. c. 95, ss. 85-87.

(*k*) 19 & 20 Vict. c. 108, s. 45; and rule 110.

(*l*) 9 & 10 Vict. c. 95, s. 88.

When an order has been made for the debt to be paid by instalments,

execution will not issue till after default in payment of an instalment; and it may then issue for the whole sum due, *ib.* s. 95.

(*m*) 9 & 10 Vict. c. 95, ss. 94, 96; 8 & 9 Vict. c. 127, s. 8.

summons, where default is made in complying with the order of the judge for payment of the money recovered (*n*).

It is competent to either party, dissatisfied with the verdict or decision of the case, to apply for a new trial, which the judge may in his discretion order to take place before a jury, although the action was not originally so tried (*o*).

The mode of removing a cause from the jurisdiction of the county court to that of a superior court, is by writ of *certiorari*. The right of so removing a cause exists at common law, but conditions have been annexed by statute to the exercise of the right in regard to cases in the county court. By the 9 & 10 Vict. c. 95, a cause may be thus removed when the debt or damage claimed exceeds 5*l.*, by leave of a judge of one of the superior courts, if the cause shall appear to him proper to be so removed, and on such terms as he shall deem fit to impose (*p*). But even if the claim in the county court do not exceed 5*l.*, it may, under the 19 & 20 Vict. c. 108 (*q*), be removed by *certiorari* to a superior court, if such court or judge shall deem it desirable that the cause be tried there, and if the party applying for the writ, shall give the security required by the act, and comply with the conditions imposed by such judge in the exercise of his discretion. One of the usual grounds for granting the writ is, that difficult questions of law will arise in the suit.

If either party to a suit in the county court, when the claim is for a sum between 20*l.* and 50*l.*, or when jurisdiction is given by agreement (unless the right of appeal is specially excluded also by agreement (*r*)), is dissatisfied with the determination or direction of the said court in

Appeal to
superior
court.

(*n*) See 9 & 10 Vict. c. 95, ss. 98, 99 (as modified by 22 & 23 Vict. c. 57). These provisions are repealed, as from Jan. 1, 1870, by the 32 & 33 Vict. c. 83, and for them is substituted, so far as applicable, s. 5 of the 32 & 33 Vict.

c. 62.

(*o*) Rule 173.

(*p*) Sect. 90; 13 & 14 Vict. c. 61, s. 16.

(*q*) Sect. 38.

(*r*) 17 & 18 Vict. c. 16, s. 1.

point of law, or upon the admission or rejection of evidence, such party may appeal from the same to any of the superior courts of common law at Westminster (*s*). Before, however, the appeal is allowed to be prosecuted, sufficient security must be given by the appellant (*t*).

An appeal may be brought from the decision of a county court judge, on the same grounds and subject to the same conditions as specified in the 13 & 14 Vict. c. 61, s. 14, in any action of ejectment, or in which the title to a corporeal or incorporeal hereditament comes in question, and with the leave of such judge in any action in which an appeal had not previously been allowed (*u*).

And here may conveniently be mentioned two species of injuries, which may be done to suitors and others by courts of limited jurisdiction: they are—1, when justice is delayed by an inferior court having proper cognizance of the cause; and, 2, when such inferior court takes upon itself to examine and decide a cause without legal authority.

1. Remedy where justice is delayed by an inferior court. Writ of *procedendo*.

1. The first of these injuries, refusal or neglect of justice, is remediable at common law by writ of *procedendo*, or of *mandamus*. A writ of *procedendo* issues where the judge of a subordinate court delays the litigating parties, and will not give judgment, either on the one side or on the other, when he ought to do so. In this case a writ of *procedendo* will be awarded, commanding him in the queen's name to proceed to judgment; but without specifying any particular judgment, for the judgment, if erroneous, may be set aside or rectified: and upon further neglect or refusal, the judge of the inferior court may be punished for his contempt, by attachment (*x*).

Mandamus.

The writ of *mandamus*, so far as it falls under our present consideration, is a command issuing in the queen's name from the court of queen's bench, and directed to an

(*s*) 13 & 14 Vict. c. 61, s. 14, as rule 134.

altered by 15 & 16 Vict. c. 54, s. 2.

See 19 & 20 Vict. c. 108, s. 68.

(*t*) 13 & 14 Vict. c. 61, s. 14; see

(*u*) 30 & 31 Vict. c. 142, s. 13.

(*x*) F. N. B. 153, 154, 240. See

Reg. v. Scalfs, 18 Q. B. 773.

inferior court of judicature within the queen's dominions, requiring it to do some particular thing therein specified, which the court of queen's bench has previously determined, or at least supposes to be consonant to right and justice. It is a high prerogative writ, of an extensively remedial nature (*y*), and issues where the party has a right to have something done, and has no other specific means of compelling its performance. A *mandamus* may, accordingly, issue to the judge of an inferior court, commanding him to do justice according to the powers of his office, whenever the same is delayed, or where he refuses to act (*z*). For it is the peculiar business of the court of queen's bench to superintend inferior tribunals, and therein to enforce the due exercise of those judicial or ministerial powers with which the crown or legislature has invested them: and this not only by restraining their excesses, but also by quickening their negligence, and obviating their denial of justice. This writ is grounded on a suggestion, by the oath of the party injured, of his own right, and the denial of justice below: whereupon, in order more fully to satisfy the court that there is a probable ground for such interposition, a rule is made directing the party complained of to show cause why a writ of *mandamus* should not issue: and, if he shows no sufficient cause, the writ itself is issued, at first in the alternative, either to do thus, or signify some reason to the contrary; to which a return, or answer, must be made at a certain day. And, if the inferior judge, or other person to whom the writ is directed, returns or signifies an insufficient reason, then there issues in the second place a peremptory *mandamus*, to do the thing absolutely: to which no other return will be admitted, but a certificate of perfect obedience and due execution of the writ. If the inferior judge or other person

(*y*) A *mandamus* has been defined by Lord Mansfield (1 W. Bla. 352) to be a prerogative writ, flowing from the king himself, sitting in the court of king's bench, superin-

tending the police and preserving the peace of the country.

(*z*) *Reg. v. Brown*, 7 E. & B. 757.

called upon makes no return, or fails in respect and obedience, he is punishable for his contempt by attachment. But, if he, at the first, returns a sufficient cause, although it should be false in fact, the court of queen's bench will not try the truth of the fact upon affidavits. By virtue of the statute 1 Will. 4, c. 21, the party applying for the writ may, however, plead to, or traverse all or any of the material facts contained in the return, and the party making it may reply, take issue, or demur, and by this mode of procedure damages and costs may be recovered, and a peremptory writ of *mandamus* may be awarded (*a*). Also, by the 6 & 7 Vict. c. 67, if the party prosecuting the writ wish to object to the validity of the return, he may do so by way of demurrer, upon which the same proceedings will be had as in a personal action; and the party aggrieved by the judgment, may sue out a writ of error in the same manner as a party to a personal action may do, and similar proceedings will be taken thereupon and costs awarded, as in ordinary cases of writs of error (*b*). An action will also lie at suit of the party injured for a false return to a *mandamus*, and damages may be recovered therein equivalent to the injury sustained, and likewise a peremptory *mandamus* may be obtained to the defendant to do his duty.

Such, as above stated, is the ordinary remedy for the injury of neglect or refusal to do justice by an inferior court. It has, however, been enacted (*c*), that no writ of *mandamus* shall issue to a judge or an officer of the county

(*a*) No action can be brought for anything done in obedience to a peremptory *mandamus*. 6 & 7 Vict. c. 67, s. 3.

(*b*) By C. L. Proc. Act, 1854, s. 77, the provisions of the C. L. Proc. Acts, "so far as they are applicable, shall apply to the pleadings and proceedings upon a prerogative writ of *mandamus*."

(*c*) 19 & 20 Vict. c. 108, s. 43.

The 11 & 12 Vict. c. 44, s. 5, has provided a procedure by rule, which may be employed instead of that by *mandamus*, for the purpose of determining any question as to the legality or illegality of any official act, which a justice of the peace may have refused to perform.

court for refusing to do any act relating to the duties of his office; but any person requiring such act to be done may apply to a superior court or a judge thereof, upon an affidavit of the facts, for a rule or summons calling upon such judge or officer of the county court, and also upon the party to be affected by such act, to show cause why the act specified should not be done; and if after the service of such rule or summons good cause be not shown, the superior court or judge thereof may by rule or order direct the act to be done, and the judge or officer of the county court, upon being served with such rule or order, must obey the same on pain of attachment.

2. The other injury, *viz.*, that of encroachment of jurisdiction, or calling one *coram non judice*, to answer in a court which has no legal cognisance of the cause, is a grievance, for which the common law has provided a remedy by the writ of prohibition. 2. Remedy where there is an encroachment of jurisdiction.

A prohibition is a writ issuing out of a superior court of law for the furtherance of justice, directed to the judge or party to a suit in an inferior court (*d*), or to both of them concurrently (*e*), commanding them to cease from Prohibition.

(*d*) From the opinion of the judges, delivered in *Mayor, &c. of London v. Cox*, L. R. 2 H. L. 280, may be collected certain tests by which to determine whether a court of justice is an inferior or a superior court:—(1.) In an inferior court the declaration must show that the cause of action arose within its jurisdiction. (2.) Whereas the judgment of a superior court unreversed is conclusive as to all relevant matters thereby decided, the judgment of an inferior court involving a question of jurisdiction is not final. (3.) The plaintiff is liable to an action for executing the process of an inferior court beyond its jurisdiction, and cannot justify under such

process, whether he knows of the defect or not, the judge and officer of the court being civilly liable if they knew of the defect of jurisdiction.

(*e*) *Mayor, &c. of London v. Cox*, L. R. 2 H. L. 280.

The court will not, in the exercise of this jurisdiction by prohibition, interfere on the application of a person who is a stranger, not in any way interested in the subject-matter of the suit sought to be prohibited, nor aggrieved by the alleged excess of jurisdiction. *Reg. v. Twiss*, L. R. 4 Q. B. 407, 413, with which compare L. R. 2 H. L. 279.

the prosecution thereof, upon a suggestion, that either the cause originally, or some collateral matter arising therein, does not belong to the jurisdiction of the court which entertains it, but to the cognisance of some other court. All lawful jurisdiction, it has been said (*f*), is derived from, and must be traced to the royal authority; and any exercise, however fitting it may appear, of jurisdiction not so authorised, is an usurpation of the prerogative, and a resort to force unwarranted by law. Upon both of these grounds, therefore, *viz.*, the infringement of the prerogative, and the unauthorised proceeding against the individual, prohibitions will be granted to restrain the court from intermeddling with or executing anything which by law it ought not to hold plea of; *ex. gr.*, if in the lord mayor's court of London, which is an inferior court, the custom of foreign attachment should be extended to a case where neither the debt sued for nor the debt alleged to be due from the garnishee to the original debtor arose within the city, no one of the parties being a citizen or a resident within the city (*g*). Prohibition will also go to the county court, should it assume to try a matter not within the limits of its statutory jurisdiction (*h*).

A short summary of the regular procedure in prohibition is as follows:—The party aggrieved in the court below applies to the superior court, setting forth in his affidavits the nature and cause of his complaint, in being drawn *ad aliud examen*, by a jurisdiction or manner of process disallowed by the laws of the kingdom: upon which, if the matter alleged appears to the court to be sufficient, the writ of prohibition immediately issues; commanding the judge not to hold, and the party not to prosecute, the plea. But sometimes the point may be too

(*f*) *Mayor, &c. of London v. Cox*,
L. R. 2 H. L. 254, citing 2 Inst.
602.

Cox, L. R. 2 H. L. 239.

(*h*) See, for instance, *Elston v.*
Rose, L. R. 4 Q. B. 4.

(*g*) See *Mayor, &c. of London v.*

nice and doubtful to be decided merely upon motion : and then, for the more solemn determination of the question, the party applying for the prohibition is directed by the court to declare in prohibition, the declaration concisely setting forth so much only of the proceeding in the inferior court as is necessary to show the ground of the application. To this declaration the defendant pleads or demurs, and the judgment is that a writ of prohibition shall or shall not issue. The action of prohibition is thus in effect nothing more than an issue directed in a disputed case only to inform the conscience of the court whether the court below has power to proceed ; both parties are actors, and no damages can be recovered therein, unless the plaintiff in the inferior court proceeds after a previous prohibition (*i*). The practice connected with prohibition to a county court has, we may add, been modified by statute (*k*), so that the matter brought before the superior court, or a judge thereof, as the ground for granting the writ, is finally disposed of by rule or order, and no declaration or further proceedings in prohibition are allowed.

The equitable jurisdiction of the county court at present extends to—(1.) Suits by creditors, legatees, whether Equitable jurisdiction. specific, pecuniary, or residuary ; devisees, in trust or otherwise ; heirs at law, or next of kin, in which the personal or real, or personal and real estate against or for an account or administration of which the demand may be made does not exceed in amount or value 500*l.* (*l*). (2.) Suits for the execution of trusts in which the trust estate or fund does not exceed in amount or value the like sum (*m*). (3.) Suits for foreclosure or redemption, or for enforcing any charge or lien, where the mortgage, charge, or lien does not exceed in amount the like sum (*n*). (4.)

(*i*) L. R. 2 H. L. 278 ; 1 Will. 4, s. 22.
 c. 21, s. 1. (*l*) 28 & 29 Vict. c. 99, s. 1.
 (*k*) 19 & 20 Vict. c. 108, ss. 40-42. See also 13 & 14 Vict. c. 61, (*m*) *Ib.*
 (*n*) *Ib.*

Suits for specific performance of or for the reforming, delivering up, or cancelling of any agreement for the sale, purchase, or lease of any property where, in the case of a sale or purchase, the purchase money, or in case of a lease the value of the property, does not exceed the like sum (*o*). (5.) Proceedings under any of the trustees relief or trustee acts (*p*), in which the trust estate or fund to which the proceeding relates does not exceed in amount or value the like sum (*q*). (6.) Proceedings relating to the maintenance or advancement of infants in which the property of the infant does not exceed in amount or value the like sum (*r*). (7.) Any suit for the dissolution or winding-up of a partnership in which the whole property, stock, and credits of such partnership does not exceed in amount or value the like sum (*s*). And (8.) Proceedings for orders in the nature of injunctions, where the same are requisite for granting relief in any matter in which jurisdiction is given by 28 & 29 Vict. c. 99, to the county court, or for stay of proceedings at law to recover any debt provable under a decree for the administration of an estate made by the court to which the application for the order to stay proceedings is made (*t*).

In all suits and matters such as above enumerated the judge and officers of the county court have respectively the powers and authorities of those of the court of chancery (*u*). The suit being commenced by filing a plaint in equity (*x*), whereupon a summons is issued to the defendant to appear and submit to judgment, and the procedure thus initiated progresses in accordance with the regulations contained in the rules and orders promulgated respecting it (*y*).

(*o*) 30 & 31 Vict. c. 142, s. 9.

(*p*) *Ante*, pp. 77, 78. These proceedings are commenced by petition in the county court. Order xi. rule 1.

(*q*) 28 & 29 Vict. c. 99, s. 1.

(*r*) *Ib.*

(*s*) *Ib.*

(*t*) *Ib.*

(*u*) 28 & 29 Vict. c. 99, s. 2.

(*x*) Order i. rule 1.

(*y*) See the County Courts Orders and Rules in Equity, 1867.

With respect to the court in which proceedings in equity are to be taken it is enacted that,—

(1.) Such as relate to the recovery or sale of any mortgage, charge, or lien on lands, tenements or hereditaments shall be taken in that county court within the district of which the said lands, tenements, or hereditaments, or any part thereof are situate (*z*). (2.) Proceedings under the Trustee Acts, 1850 and 1852, shall be taken in the county court within the district of which the persons making the application, or any of them, may reside (*a*). (3.) Proceedings for the administration of the assets of a deceased person shall be taken in the county court within the district of which the deceased person had his last place of abode in England, or in which the personal representatives, or any one of them, shall have their or his place of abode (*b*). (4.) Proceedings in partnership cases shall be taken in the county court within the district of which the partnership business was or is carried on (*c*). (5.) Proceedings for the specific performance or the delivery up or cancelling of agreements shall be taken in the county court within the district of which the defendants, or any one of them, may reside or carry on business (*d*): and (6.) Proceedings in any suit or other matter under 28 & 29 Vict. c. 99, not otherwise provided for, shall be taken or instituted in the county court within the district of which the defendants, or any or either of them, may reside or carry on business (*e*).

We may add that any suit or proceeding pending in the court of chancery, which might have been commenced in a county court, may by order of the judge to whose court it is attached be transferred to that county court in which it might have been originally instituted (*f*).

The foregoing cursory comments upon the jurisdiction

(*z*) 28 & 29 Vict. c. 99, s. 10.

(*a*) *Ib.*

(*b*) *Ib.*

(*c*) *Ib.*

(*d*) *Ib.*

(*e*) *Ib.*

(*f*) 30 & 31 Vict. c. 142, s. 8.

and practice of the county court will, for the purposes of this volume of our Commentaries, suffice. The powers of this tribunal have thus far been gradually extended and amplified by piecemeal legislation; their actual condition being unsatisfactory (*g*), and such as cannot reasonably be expected to endure. The policy of recent parliaments has in the main been similar to that of our ancient constitution, as regulated and established by the Anglo-Saxons, whose endeavour was to bring justice home to every man's door, by constituting as many courts of judicature as there were manors and townships in the kingdom, wherein injuries might be redressed in an easy and expeditious manner, by the suffrage of neighbours and friends. The

(*g*) The Judicature Commissioners, in their first Report, 1869, p. 8, observe, that the present state of the county courts may be appropriately referred to as exhibiting the strange working of a system of separate jurisdictions, even when exercised by the same court.

The county court (they remark) has jurisdiction in common law cases, up to 50*l.* in contracts, and to 10*l.* in torts. It has also equitable jurisdiction in certain cases when the value of the property in dispute does not exceed 500*l.*, and in at least one of such cases, namely, an administration suit, it is now competent for any county court judge to restrain the prosecution of actions brought by creditors in any of the superior courts of common law. By stat. 31 & 32 Vict. c. 71 (amended by 32 & 33 Vict. c. 51) some of the county courts have also been invested with admiralty jurisdiction in a large class of cases, where the amount in dispute does not exceed, in some cases 150*l.*, and in others 300*l.*

There is an appeal in each class of cases, within certain limits, to a court of common law, to the court of chancery, or to the court of admiralty. But these jurisdictions, though conferred on the same court and the same judge, still remain quite distinct and separate. The judge has no power to administer in one and the same suit any combination of the different remedies which belong to his three jurisdictions, however convenient or appropriate such redress may be. That can only be accomplished, under the county court system, by three distinct suits brought in the same court and before the same judge, carried on under three different forms of procedure, and controlled by three different courts of appeal. In this case, therefore, although we appear at first sight to have obtained that great desideratum, the consolidation of all the elements of a complete remedy in the same court, yet, as that remedy can only be had in three separate suits, the evil is equally great.

little courts thus constituted in early times, communicated with others of larger jurisdiction, and those with others of a still greater power; ascending gradually from the lowest to the supreme courts, which were respectively constituted to correct the errors of the inferior ones, and to determine such causes as demanded by reason of their weight and difficulty a solemn discussion. The course of justice flowing in large streams from the crown, as its fountain, to the superior courts of record; and being then subdivided into smaller channels, till the whole, and every part of the kingdom, was plentifully watered and refreshed. The minor tribunals here in view have at this day little beside historical interest attaching to them, inasmuch as by statutory provisions noticed at a former page (*h*), they have been stripped of their civil jurisdiction.

The court-baron is a court, not of record, incident to a manor, and holden by the steward thereof, and is of two natures: the one being a customary court, in which the estates of the copyholders are transferred by surrender and admittance, and other matters transacted relative to their tenures only (*i*); the other, of which we now speak, being a court of common law, held before the freeholders owing suit and service to the manor. This latter court was composed of the lord's tenants (*j*), who were the *pares* of each other, and were bound by their feudal tenure to assist their lord in the dispensation of domestic justice. Suit of court was, indeed, a duty and service issuing and arising *ratione tenuræ*, the tenants being bound duly to attend and follow the lord's courts, and there from time to time give their assistance, either deciding the property of their neighbours in the court-baron, or correcting their misdemeanors in the court-leet.

The court-baron was formerly held every three weeks; its most important business was to determine controversies relating to the right of lands within the manor, and

(*h*) *Ante*, pp. 444, 445.

(*i*) *Ante*, vol. ii. pp. 194 *et seq.*

(*j*) *Ib.* p. 177.

it also held plea of personal actions, where the debt or damages did not amount to forty shillings (*k*).

Hundred
court.

A hundred-court was only a larger court-baron, held for all the inhabitants of a particular hundred instead of a manor. The free suitors were here also the judges, and the steward the registrar, as in the case of a court-baron. It likewise is no court of record, and is said by sir Edward Coke to have been derived out of the county court for the ease of the people, that they might have justice done to them at their own doors, without any charge or loss of time (*l*); but its institution was probably coeval with that of hundreds themselves, which seem to have been, in the Anglo-Saxon times, derived from the polity of the ancient Germans.

County
court.

The county court is a court incident to the jurisdiction of the sheriff. It is not a court of record, but formerly held pleas of debt or damages under the value of forty shillings (*m*). The county court now spoken of still exists for important practical purposes. The freeholders of the county are the real judges, the sheriff being a ministerial officer in this court. The great conflux of freeholders, supposed always to attend at the county court, (which Spelman calls "*forum plebeie justitie et theatrum comitivie potestatis*" (*n*)), is the reason why all acts of parliament at the end of every session were wont to be there published by the sheriff; why outlawries are there proclaimed; and why popular elections which the freeholders are to make, as formerly of sheriffs and conservators of the peace, and still of coroners, verderors, and knights of the shire, must be made *in pleno comitatu*, or in full county court. By the statute 2 Edw. 6, c. 25, no county court shall be adjourned longer than for one month, consisting of twenty-eight days. And this was also the ancient usage, as appears from the laws of king Edward

(*k*) Finch, L. 248.

(*l*) 2 Inst. 71.

(*m*) 4 Inst. 266.

(*n*) Gloss. *Comitatus*.

the elder (*o*); "*præpositus*" (that is, the sheriff) "*ad quartam circiter septimanam frequentem populi concionem celebrato: cuique jus dicito; litesque singulas dirimito.*" In those times the county court was a court of great dignity and splendour, the bishop and the ealdorman (or earl) with the principal men of the shire sitting therein to administer justice both in lay and ecclesiastical causes (*p*). But its dignity was much impaired, when the bishop was prohibited and the earl neglected to attend it (*q*). And the county court here treated of was at length deprived of its civil jurisdiction by the 9 & 10 Viet. c. 95.

The forest courts, although still existing, claim our attention by reason of their ancient rather than of their actual importance. We shall first notice them historically, and then briefly indicate the jurisdiction and powers which survive to them.

The forest courts (*r*) were instituted for the government of the king's forests in different parts of the kingdom, and for the punishment of injuries done to the king's deer or venison, to the vert or greensward, and to the covert in which such deer are lodged. They included the courts of attachments, of regard, of sweinmote, and of justice-seat. The court of attachments, woodmote, or forty days' court, was to be held before the verderors of the forest once in every forty days (*s*); and was instituted to inquire concerning offenders against vert and venison (*t*); who might be attached by their bodies, if taken with the mainour (or *mainœuvre, a manu*), that is, in the very act of killing venison, or stealing wood, or preparing so to do, or by fresh and immediate pursuit after the act had been done (*u*); else they were attached by their goods. In

Forest
court.

(*o*) C. 11.

(*p*) Leg. Eadgar. c. 5.

(*q*) F. N. B. 70; Finch. 445.

(*r*) Ample historical details as to these courts and their jurisdictions are collected in the Report of the Royal New and Waltham Forests

Commission, A.D. 1850, pp. 36-39, 52.

(*s*) Cart. de Forest, 9 Hen. 3, c. 8.

(*t*) 4 Inst. 289.

(*u*) Carth. 79.

this forty days' court the foresters or keepers were to bring in their attachments, or presentments *de viridi et venatione*; and the verderors were to receive the same, to enrol them, and to certify them under their seals to the court of justice-seat, or sweinmote (*v*): for this court could only inquire of, but not convict, offenders. 2. The court of regard, or survey of dogs, was held every third year for the lawing or expeditation of mastiffs, which was done by cutting off the claws and ball (or pelote) of the fore-feet, to prevent them from running after deer (*x*). No other dogs but mastiffs were to be thus lawed or expeditated, for none others were permitted to be kept within the precincts of the forest, it being supposed that the keeping of these, and these only, was necessary for the defence of a man's house (*y*). 3. The court of sweinmote was held before the verderors, as judges, by the steward of the sweinmote thrice in every year (*z*), the sweins or freeholders within the forest composing the jury. The principal jurisdiction of this court was, first, to inquire into the oppressions and grievances committed by the officers of the forest; "*de super-operatione forestariorum, et aliorum ministrorum forestæ; et de eorum oppressionibus populo regis illatis*;" and, secondly, to receive and try presentments certified from the court of attachment against offences in vert and venison (*a*). And this court might not only inquire, but convict also, any conviction thus had being certified to the court of justice-seat under the seals of the jury, for this court could not proceed to judgment (*b*). But the principal court was:—4. The court of justice-seat, which was held before the chief justice in eyre, or chief itinerant judge, *capitalis justitiarius in itinere*, or his deputy, to hear and determine all trespasses within the forest, and all claims of franchises, liberties, and privileges, and all pleas and causes whatsoever therein arising (*c*). It might

(*v*) Cart. de Forest. c. 16.

(*a*) Stat. 34 Edw. 1, c. 1.

(*x*) *Ib.* c. 6.

(*b*) 4 Inst. 289.

(*y*) 4 Inst. 308.

(*c*) *Ib.* 291.

(*z*) Cart. de Forest. c. 8.

also proceed to try presentments in the inferior courts of the forests, and to give judgment upon conviction of the sweinmote. And the chief justice might therefore after presentment made, or indictment found, but not before (*d*), issue his warrant to the officers of the forest to apprehend the offenders. It might be held every third year; and forty days' notice was to be given of its sitting. This court might fine and imprison for offences within the forest (*e*), it being a court of record: and therefore a writ of error lay from thence to the court of king's bench, to rectify and redress any mal-administration of justice (*f*); or the chief justice in eyre might adjourn any matter of law into the court of king's bench (*g*). These justices in eyre were instituted by king Henry II., A.D. 1184 (*h*); and their courts were formerly very regularly held; but the last court of justice-seat of any note was that holden in the reign of Charles I., before the earl of Holland; the rigorous proceedings at which are reported by sir William Jones. After the restoration another was held, *pro forma* only, before the earl of Oxford (*i*); but since the æra of the Revolution in 1688, the forest laws fell much into disuse, to the great advantage of the subject. They are, however, administered in a mitigated form, and within very restricted geographical limits at the present day.

There are, indeed, now only three royal forests existing in England, *viz.*, the New Forest, Dean Forest, and that part of Waltham Forest called Epping Forest—all the other crown forests having been disafforested (*k*).

The only court now held in the New Forest is practically (*l*) the court of attachments held every forty days—

(*d*) Stat. 1 Edw. 3, c. 8; 7 Ric. 2, c. 4.

(*e*) 4 Inst. 313.

(*f*) *Ib.* 297.

(*g*) *Ib.* 295.

(*h*) Hoveden.

(*i*) North's Life of Lord Guild-

ford, 45.

(*k*) See vol. i. p. 344.

(*l*) In the month of September, every year, a court of sweinmote is held, but it differs in name only from the court of attachments.

of which court the verderors, elected by the freeholders of the county, are the judges. The course of procedure observed there is briefly this. The presentment of an offence is made by the keeper of the walk in which it occurred at one court and is heard at the next ensuing court, one verderor being competent to receive the presentment, though two verderors are present at the hearing of the case (*m*).

The court of attachments deals with wrongful inclosures, purprestures, encroachments, or trespasses (*n*); breaking down inclosures, burning heath or fern, destroying the covert, or stealing the wood of the forest (*o*). It deals also with offences in depasturing cattle, horses, or other beasts at improper times by those who have common of pasture at certain seasons within the boundaries of the forest; and it also has cognisance of the depasturing of beasts at any season by those who have not common of pasture (*p*), and of the misconduct of regariders or other officers of the forest (*q*). For such misdoings pecuniary penalties may be inflicted by the court.

The verderors also fine persons having rights of turbary for taking turf from pasture land instead of from the heath ground, and for cutting the turves in an improper manner and contrary to the forest rule. Persons charged with damaging trees or with poaching being generally sent before the magistrates (*r*).

Other
courts.

Besides the above courts some others deserve to be

(*m*) One or more of the regariders of the forest also usually attend the court, but do not take any part in the proceedings. They ought to present any offence that may come to their knowledge. The regariders are elected by the freeholders of the county.

(*n*) See 10 Geo. 4, c. 50, s. 100.

(*o*) See 9 & 10 Will. 3, c. 36.

(*p*) See 59 Geo. 3, c. 86, ss. 1-4.

(*q*) 59 Geo. 3, c. 86, s. 6.

(*r*) In Dean Forest the court of attachments, composed of the verderors, is still held every forty days, with a jurisdiction in regard to trespassers similar to that above set forth, and power to inflict fines not exceeding 20*l.* in amount. It also has some criminal jurisdiction.

In Waltham Forest courts have not been held for some years; they could however at any time be revived.

noticed by reason of their antiquity, or as possessing jurisdiction of more or less local importance; amongst them may, in the first place, be specified the courts of the counties palatine of Durham and Lancaster (*s*); and the stannary (*t*) court in Devonshire and Cornwall, for the administration of justice among the miners there, which is a court of record of a special nature, exercising a jurisdiction in part equitable and in part legal, and not superseded by that of the county court (*u*). The stannary courts were originally held, in virtue of a privilege granted to the workers in the tin mines, in the counties named to sue and be sued only in their own courts, that they might not be drawn from their business by having to attend law suits in other courts (*x*). The privileges of the tinnerns were confirmed by a charter, 33 Edw. 1., and fully expounded by a private statute (*y*), 50 Edw. 3., which was subsequently explained by a public act, 16 Car. 1. c. 15. The effect of these, so far as relates to our present purpose, was: that all tinnerns and labourers in and about the stannaries should, during the time of their working therein *bonâ fide*, be privileged from suits of other courts, and be only impleaded in the stannary court in all matters, excepting pleas of land, life, and member.

Stannary
court.

In each of the stannaries of Cornwall there was formerly a court called the steward's court, in which he exercised a common law jurisdiction, and the vice-warden of the stanneries exercised in his court an original equitable jurisdiction (*z*). These jurisdictions were confined to cases wherein tin or tinnerns were concerned, and did not extend to matters relating to lead, copper, or other metals, which in modern times have been dis-

(*s*) As to which see vol. i. p. 142.

(*t*) From the Latin, *stannum*, tin.

(*u*) 9 & 10 Vict. c. 95, s. 141 (as to the precise effect of which see *Newton v. Nancarrow*, 15 Q. B. 144); 18 & 19 Vict. c. 32, s. 17.

(*x*) 4 Inst. 232.

(*y*) See this at length in 4 Inst. 232.

(*z*) As to the former equitable jurisdiction of the court, see, however, Bainbridge's *Law of Mines*, 3rd ed. 696.

covered in the county. By various statutes, however, below cited (*a*), the jurisdiction of the stannary court has been amplified, and the procedure in it has been revised. The stannaries of Cornwall and Devon now form one entire district. The vice-warden has jurisdiction in actions of contract or tort to the extent of 50*l.*, and his equitable jurisdiction extends to cases arising with respect to the operations of any mine worked for lead, copper, or any metallic mineral, as fully as with respect to tin or tin-mines (*b*). It extends also to non-metallic minerals found in the same mine and worked by the same adventurers (*c*). From the decisions of the vice-warden, both in equity and at common law, an appeal lies to the lord warden, assisted by two or more members of the judicial committee of the privy council, or judges of equity, or courts of law at Westminster; and every judgment of the lord warden is subject to an appeal to the house of lords.

Courts of
London, &c.

The courts within the city of London (*d*), and other cities and boroughs throughout the kingdom, held by prescription, charter, or act of parliament (*e*), are to be

(*a*) 6 & 7 Will. 4, c. 106; 2 & 3 Vict. c. 58; 11 & 12 Vict. c. 83; 18 & 19 Vict. c. 32; 32 & 33 Vict. c. 19, which amends the law relating to mining partnerships within the stannaries and to the court of the vice-warden.

(*b*) Bainbridge, *Law of Mines*, 3rd ed. 696.

(*c*) *Ib.*

(*d*) These courts are the court of hustings, held before the mayor, recorder, and sheriffs; the Lord Mayor's court, as to which see *Mayor, &c. of London v. Cox*, L. R. 2 H. L. 239, cited *ante*, p. 459, 20 & 21 Vict. c. clvii.; and the City of London court, which is now included in the county courts, 30 & 31 Vict. c. 142, s. 35.

The customs of the city of Lon-

don are tried or made known in a superior court by the certificate of the mayor and aldermen, certified by the mouth of their recorder. But this rule admits of an exception, where the corporation of London is party, or interested in the suit; for there the reason of the law will not endure so partial a trial; and such a custom is to be determined by a jury, and not by the mayor and aldermen, certifying by the mouth of their recorder. Co. Litt. 74; Bro. Abr. tit. Trial, pl. 96; Hob. 85.

(*e*) See, as to inferior courts of record, 1 & 2 Vict. c. 110, s. 22.

By the 15 & 16 Vict. c. 54, s. 7, the jurisdiction of any local court having concurrent jurisdiction with a county court, may, on petition to

included in our present list. It would, indeed, exceed the design and compass of our present inquiries, if we were to enter into a particular detail of these local tribunals—to examine the nature and extent of their several jurisdictions, and the mode of procedure observed in them. It must in general suffice to say, that these special jurisdictions arose originally from the favour of the crown to those particular districts, wherein we find them erected, upon the same principle that hundred-courts, and the like, were established; for the convenience of the inhabitants, that they might prosecute their suits, and receive justice at home: that, for the most part, the courts at Westminster Hall have a concurrent jurisdiction with these, or else a superintendency over them: and that the proceedings in these special courts ought to be according to the course of the common law, unless otherwise ordered by parliament; for though the king may erect new courts, yet he cannot alter the established course of the law.

Here, also, may be mentioned the chancellor's courts of the universities of Oxford and Cambridge, which, besides taking cognisance of criminal acts as hereafter mentioned (*f*), possess a civil jurisdiction (*g*). The

Courts of
the uni-
versities.

the queen in council, "be excluded in any causes whereof the county court hath cognisance."

(*f*) Vol. iv. p. 361.

(*g*) Which was granted in order that the students might not be distracted from their studies by legal process from distant courts, and other forensic avocations. Privileges of this kind are of very high antiquity, and were generally enjoyed by foreign universities, as well as by our own. (See, for instance, Cod. 4, 13.) In England, the oldest charter containing this grant to the university of Oxford, was 28 Hen. 3, A.D. 1244. And

the same privileges were confirmed and enlarged by almost every succeeding prince, down to king Henry VIII.; in the fourteenth year of whose reign the largest and most extensive charter of all was granted. One similar to which was afterwards granted to Cambridge in the third year of queen Elizabeth. But yet, notwithstanding these charters, the privileges granted therein, of proceeding in a course different from the law of the land, were of so high a nature, that they were held to be invalid; for though the king might erect new courts, yet he could not alter the course of law by his letters

privilege of Cambridge in this particular has been restricted by a recent enactment (*h*), and formerly differed from that of Oxford: extending only to causes of action accruing in the town and its suburbs; whereas the jurisdiction of the chancellor's court at Oxford extended, and still extends, to all personal causes anywhere arising (*i*). The respective jurisdictions of these courts are not affected by the county court acts (*k*).

Commissioners of sewers.

The last species of courts to be here mentioned is that of commissioners of sewers. This was formerly a temporary tribunal erected by virtue of a commission under the great seal; which used to be granted *pro re nata* at the pleasure of the crown, but afterwards at the discretion and nomination of the lord chancellor, lord treasurer, and chief justices, pursuant to the statute 23 Hen. 8, c. 5. The jurisdiction of the commissioners being to overlook the repairs of sea banks and sea walls: and the cleansing of rivers, public streams, ditches, and other conduits, whereby any waters are carried off: and being confined to such county or particular district as the commission expressly named. The court of the old commissioners of sewers was a court of record (*l*); and in the

patent. Therefore, in the reign of queen Elizabeth, an act of parliament was obtained (13 Eliz. c. 29) confirming all the charters of the two universities, and those of 14 Hen. 8 and 3 Eliz. by name, which "blessed act," as sir Edward Coke entitles it (4 Inst. 227), established this high privilege without any doubt or opposition; or, as sir Matthew Hale observes (Hist. C. L. 33), "Although king Henry the Eighth, 14 anno regni sui, granted to the university a liberal charter, to proceed according to the use of the university, viz., by a course much conformed to the civil law, yet that charter had not been sufficient to

have warranted such proceedings without the help of an act of parliament. And therefore in 13 Eliz. an act passed, whereby that charter was in effect enacted; and it is thereby that at this day they have a kind of civil procedure, even in matters that are of themselves of common law cognisance, where either of the parties is privileged."

(*h*) 19 & 20 Vict. c. xvii.

(*i*) The privilege of the university of Oxford is fully stated in *Re The Chancellor, &c. of the University of Oxford and John Tay'or*, 1 Q. B. 952.

(*k*) 9 & 10 Vict. c. 95, s. 140.

(*l*) *Vide per* Willes, J., 19 C. B. N. S. 497.

execution of their duty the commissioners might proceed by jury, or upon their own view, and might take order for the removal of annoyances, or the safeguard and conservation of the sewers within their commission, either according to the laws and customs of Romney Marsh (*m*), or otherwise at their own discretion. They were also to assess such rates upon the owners of lands within their district, as they should judge necessary; and if any person refused to pay them, the commissioners were empowered to levy the same by distress of his goods and chattels; or they might by statute 23 Hen. 8, c. 5, sell his freehold lands (and by the 7 Ann. c. 10, his copyhold also) in order to pay such assessments. But their conduct was under the control of the court of king's bench (*n*).

The law relating to sewers was materially improved by the statute 3 & 4 Will. 4, c. 22 (amended by subsequent enactments (*o*)), which contains provisions as to the qualification of the commissioners, their meetings and mode of procedure, the laying of rates, the making of new works, and purchase of land by them for the purposes of the act; the vesting of property in the commissioners, the levying of fines and penalties by them, and other matters. The statute 24 & 25 Vict. c. 133, also empowers the crown on the recommendation of the inclosure commissioners to issue commissions of sewers

(*m*) A tract of land in the county of Kent, containing 24,000 acres, governed by certain ancient and equitable laws of sewers, composed by Henry de Bathe, a judge, *temp.* king Henry III. 4 Inst. 276.

(*n*) *Hetley v. Boyer*, Cro. Jac. 336.

And yet in the reign of king James I. (A.D. 1616) the privy council took upon them to order that no action or complaint should be prosecuted against the commis-

sioners, unless before that board: and committed several persons to prison who had brought such actions at common law, till they should release the same; and one of the reasons for discharging sir Edward Coke from his office of lord chief justice may have been for countenancing those actions. Moor, 825, 826.

(*o*) Of which may be specified 4 & 5 Vict. c. 45; 12 & 13 Vict. c. 50; 24 & 25 Vict. c. 133.

for new areas in all parts of England, inland as well as maritime, with power not merely to maintain existing but to erect new works (*p*).

In reference generally to courts, such as above noticed, of limited and special jurisdiction, an observation of sir Edward Coke (*q*) may properly be cited—that these particular jurisdictions, derogating from the general jurisdiction of the courts of common law, are ever strictly restrained, and cannot be extended further than the express letter of their privileges will most explicitly warrant.

(*p*) See particularly ss. 4, *et seq.*

(*q*) 2 Inst. 548.

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